UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 01-01139 (JKF)
	.	Jointly Administered
W.R. GRACE & COMPANY, et al.,	.	5414 U.S. Steel Tower
	.	600 Grant Street
	.	Pittsburgh, PA 15219
Debtors.	.	
	.	June 23, 2009
. . . . .		9:10 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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THE COURT: Please be seated. This is the continuation of the Phase I plan confirmation hearing in the matter of W.R. Grace, Bankruptcy Number 01-1139.

I have a list of participants by phone. Scott Baena, Brandon Baer, Jim Barrett, Daniel Beller, Deanne Boll, Thomas Brandi, Peg Brickley, Oliver Butt, Elizabeth Cabraser, Linda Casey, Richard Cobb, Tiffany Cobb, Leslie Davis, Michael Davis, Elizabeth DeCristofaro, Elizabeth Devine, Martin Dies, Melanie Dritz, Terence Edwards, Marion Fairey, Erin Fay, Jordan Fisher, Jeff Friedman, James Green, John Greene, Robert Guttmann, Noah Heller, Daniel Hogan, Robert Horkovich, Brian Kasprzak, David Klauder, Matthew Kramer, Michael Lastowski, Richard Levy, Alan Madian, Peri Mahaley, John Mattey, Garvan McDaniel, Alex Mueller, Marti Murray, Kate Orr, Merritt Pardini, David Parsons, Margaret Philips, John Phillips, Mark Plevin, Joseph Radecki, Natalie Ramsey, Andrew Rosenberg, Alan Runyan, Jay Sakalo, Darrell Scott, Stephen Shimshak, Marnie Simon, Jason Solganick, Daniel Speights, Shayne Spencer, Theodore Tacconelli, Alexander Thain, Edward Westbrook, Jennifer Whitener, Richard Wyron and Rebecca Zubaty. I guess I'll take entries in the court. It looks like there have been some changes. Good morning.

MR. BERNICK: Good morning, Your Honor. David Bernick for Grace.

MS. HARDING: Good morning, Your Honor, Barbara

Harding for Grace.

MS. BAER: Good morning, Your Honor, Janet Baer for Grace.

MS. ESAYIAN: Your Honor, Lisa Esayian for Grace.

MR. FREEDMAN: Theodore Freedman for Grace.

COURT CLERK: Hold on please.

MR. FRANKEL: Good morning, Your Honor, Roger Frankel for the PI future claimants representative. Also with me is Richard Wyron and Jonathan Guy, my partners.

THE COURT: Thank you.

MR. HOROWITZ: Good morning, Your Honor. Gregory Horowitz from Kramer Levin for the Official Equity Committee.

MR. LOCKWOOD: Good morning, Your Honor, Peter Lockwood for the ACC. And with me is my colleague, Kevin Maclay.

MR. BROWN: Good morning, Your Honor. Michael Brown, Warren Pratt and Jeff Boerger for Geico, Republic Insurance Company and Seaton Insurance Company.

MR. GLOSBAND: Good morning, Your Honor. Dan Glosband from Goodwin Proctor, and Michael Giannotto from Goodwin Proctor.

THE COURT: Your microphone’s not on, Mr. Glosband. Just press the button. Thank you.

MR. GLOSBAND: Good morning, Your Honor. Dan Glosband and Michael Giannotto from Goodwin and Proctor for CNA

Insurance.

MS. DeCRISTOFARO: Good morning, Your Honor. Elizabeth DeCristofaro, Ford Marrin, for Continental Insurance Company and Continental Casualty Company.

THE COURT: Just a second please. Thank you.

MR. MILLNER: Good morning, Your Honor. Robert Millner for General Insurance Company of America.

MR. COHN: Good morning, Your Honor. Jacob Cohn for Federal Insurance Company.

MR. O'NEILL: Good morning, Your Honor. James O'Neill for Grace.

MR. HURFORD: Good morning, Your Honor. Mark Hurford, Campbell Levin, for the ACC.

MR. KRAMER: Good morning, Your Honor. Matt Kramer, Bilzin Sumberg, on behalf of the PD Committee.

MR. SHINER: Good morning, Your Honor. Michael Shiner, and with me, Eileen McCabe for AXA Belgium.

MR. RICH: Good morning, Your Honor. Alan Rich for the PD FCR.

MR. PASQUALE: Good morning, Your Honor.

THE COURT: Good morning.

MR. PASQUALE: Ken Pasquale. And with me is Arlene Krieger from Strook for the Unsecured Creditors Committee.

MR. PERNICONE: Good morning, Your Honor. Carl Pernicone for Arrowood Indemnity.

MR. TURETSKY: Good morning, Your Honor. David Turetsky of Skadden for Sealed Air Corporation. Also with me is J. Gregory St. Clair, also of Skadden.

THE COURT: Thank you. Good morning.

MR. COOK: Good morning, Your Honor. Nathan Cook on behalf of Fresenius Medical Care Holdings Inc.

THE COURT: Good morning.

MR. DEMMY: Your Honor, John Demmy of Stevens and Lee for Fireman's Fund Insurance Company and the Allianz insurers.

THE COURT: Good morning.

MR. LONGOSZ: Good morning, Your Honor. Edward Longosz for Maryland Casualty and Zurich.

MR. WISLER: Good morning, Your Honor. Jeffrey Wisler for Zurich International Limited and Zurich Insurance Company and Allstate Maryland Casualty Company.

THE COURT: Okay, thank you. All right. Mr. Bernick? No, Mr. Brown? Okay.

MR. BROWN: Your Honor, just a process question yesterday. I think we contemplated yesterday that we would present evidence to Your Honor followed by argument. It seems to me that that's likely to be a mechanical exercise and if the Court will permit, I'd prefer to go forward with the argument first while the courtroom's still cool and we deal with the mechanical issues afterwards.

THE COURT: That's fine.

MR. BROWN: This is not going to be particularly long I don't think, Your Honor.

Your Honor, yesterday Mr. Bernick told you that the purpose of Section 7.15 of the plan was to prevent the Asbestos PI Trust from using the bankruptcy proceeding as a sword against the insurers and subsequent coverage litigation. It took Mr. Bernick and Mr. Lockwood an hour and a half to explain one and a half pages of the plan to Your Honor and how it was intended to operate. And they admitted in the process that Your Honor was in fact the author of the operative language in 7.15, which is correct.

As Your Honor considers whether 7.15 is clear and does the trick, I think the most important thing you need to keep in mind is who is the audience? And the audience for that language is no one in this court. It's a coverage judge somewhere in some court that none of us know the identity of. And that coverage judge isn't going to be familiar with that type of language. He or she is not likely to be familiar with the Bankruptcy code or bankruptcy plans, and he or she is likely to have as much aversion to learning about those as Your Honor has to getting involved in coverage litigation.

So the question is how is Section 7.15 likely to be received by this individual? And I think that the best way to illustrate that reception that 7.15 will get in that coverage litigation is the reception it got from one of the plan

proponents himself, and that is Mr. Austern. I've been accused of picking on Mr. Austern in connection with his deposition testimony, and that is not my intent at all. I know Your Honor knows him well, he's well respected. He has been a practicing attorney for 40 years, has been a law professor, he's been a prosecutor. He's the general counsel of the Manville Trust, and he's the FCR in Combustion Engineering. And at his deposition, Your Honor, I asked him a series of questions about Section 7.15. Your Honor, this appears in the trial brief of Geico, et al at Pages eight -- seven and eight. And it also appears in Mr. Austern's deposition testimony at Pages 44 to 61.

"Q Are there particular provisions in the plan that you don't understand?

"A Yes.

"Q Are there any that stick out in your mind in that regard?

"A Can I look at the plan for a moment?

"Q Sure.

"A By way of example, 7.15 of the documents.

"Q That's the one you don't understand?

"A Well, it's one that I have trouble trying to understand.

"Q Do you believe Section 7.15 to be unclear?

"A To me."

I then proceeded to ask Mr. Austern a series of questions of the sort that Mr. Lockwood went through with the

Court yesterday, about how 7.15 operates, how it's intended to interplay between it and other provisions of the plan. In response to every one of those questions, he said, "I don't know." Now, in their trial brief, Your Honor, the plan proponents say, big deal, he wasn't a 30(b)(6) witness. Well, my answer as to that, Your Honor, is the judge in the coverage case isn't going to be a 30(b)(6) witness either, but that's the audience and that's the person who will need to understand what is intended by Section 7.15.

Now, I mentioned yesterday, Your Honor, that we wanted to go through some evidence, and we'll present that after I give my argument. I want to make clear what the purpose of putting this evidence into the record is. The purpose, Your Honor, is not to ask Your Honor to make coverage decisions. I think the one thing we can all agree on, including Your Honor, is that's not what you want to do, that's not what's intended here, but I want Your Honor to have at least an idea in the record of what has actually transpired and an example of what the insurers are trying to preserve for purposes of subsequent coverage litigation.

So I'm going to run you through, Your Honor, what I believe to be undisputed facts. And we'll have citations to the record at the appropriate time. Two of my -- I'm going to focus, Your Honor, on two of my clients, because they're the easy ones. They're the ones that Mr. Lockwood described as

totally unsettled. And he was correct in that. And they are Geico and Republic. Geico and Republic issued certain liability insurance policies to Grace. Grace has admitted that Geico and Republic have not breached any of their obligations under those policies. Grace has also admitted that Geico and Republic have not waived and have not ceded any of the rights under those policies. The policies, Your Honor, which we'll introduce into evidence subject to a relevance objection, have a number of provisions that Your Honor has heard countless times in these asbestos bankruptcy cases. They have an anti-assignment provision. That's a Phase II issue. They have a notice provision. They have a duty to cooperate. They have a provision relating to voluntary payments and the excess policies have a provision dealing with the insurers' right to associate in the defense of claims.

THE COURT: Are these all excess policies?

MR. BROWN: Yes. Now on April 6th of 2008, Your Honor, the debtors and the ACC, the FCR and the Equity Committee executed a term sheet. And the term sheet provided for the resolution of the debtors' asbestos liabilities, both current and future. Your Honor, that was attached to an 8K filed by the debtors back in April of 2008.

It's undisputed that the debtors, the ACC and the FCR did not consult with or seek the consent of the debtors' insurers with respect to any term in that term sheet before

they executed it. The term sheet has, not surprisingly, provisions in it providing for the assignment of asbestos insurance policies, proceeds, rights, whatever the term is you want to use. The term sheet also provides that the ACC and FCR will establish the trust agreement and the TDPs.

Now, prior to executing that term sheet, the ACC and the FCR filed a plan with this Court. And in connection with that plan, the ACC prepared a set of TDPs, which it then shared with the FCR and the two of them agreed to a set of TDPs. That happened before the term sheet was executed.

On April 6th -- excuse me -- between April 6th and September of 2008, the plan proponents were working on plan documents. In connection with that work on those plan documents, they didn't consult with and they didn't seek the consent of any of the objecting insurers here today regarding any provision in the plan or plan documents.

We know that the debtors were given an opportunity to comment on the TDPs. And at his deposition, Mr. Hughes testified that while he recalls having an opportunity to comment, he could not remember a specific comment that he made. Similarly, Mr. Inselbuch, who was the principal attorney on the ACC side, could not recall a single comment that the debtors had to the TDPs. Now, by their terms, and this is on the face of the document, Your Honor, the TDPs provide for absolutely no role whatsoever for any insured. You won't find, it you can

read it front to back, you won't find any role for the insurers.

The TDPs set forth a number of processes pursuant to which asbestos claims against the trust are to be resolved. It has an expedited review process, it has an individual review process, it has arbitration, it has claimants going back out into the tort system. It is undisputed that in these cases the overwhelming majority of cases that get submitted to the trust are resolved through the expedited review process. Some perhaps through individual review.

Mr. Lockwood testified that the TDPs might provide or could provide for a role for the insurers in connection with those claims that windup in the tort system. Mr. Austern testified that in the 20-year history of the Manville Trust, he can recall one such claim. Mr. Vincent testified that in all the asbestos bankruptcy cases that he has been involved in, which, Your Honor, I know, knows is quite a few, he couldn't remember a single case that wound up in the tort system.

So the bottom line is, Your Honor, the way that the TDPs are put together, it is contemplated that the overwhelming majority of claims that get submitted to the trust are going to wind up getting paid through the expedited review process on a matrix, all of which were terms that were established by the ACC and the FCR.

Mr. Austern testified that in connection with that

claims resolution process in the TDP that he did not think the trust was going to, “Call up each and every insurance company and say, can I settle this claim?” In other words, the trust is going to settle the claims pursuant to the procedures set forth, notwithstanding the insurers’ rights under their policies, for example, to associate a defense.

Now, the plan proponents -- and, Your Honor, I don’t know if you have this. Did you receive a copy of the proposed order that you ordered --

THE COURT: No, I did not.

MR. BROWN: -- Mr. Lockwood to prepare? I don’t know if someone has a clean copy of that.

MR. BERNICK: I apologize, Your Honor. Yesterday I thought Your Honor had it, otherwise I would have furnished it to the Court.

THE COURT: Well, you had it on the screen, Mr. Bernick, I just haven’t physically seen it. Thank you.

MR. BROWN: Now, Your Honor, if you look at the, after the windup, it says, "That it is hereby ordered that the plan properly preserves all rights and coverage defenses of the insurers that issued non-settled insurance policies." One of the problems I have with this proposed order, Your Honor, is I don’t know what it means to preserve all rights. One of the rights that we’ve outlined, and we’re not asking Your Honor to find that we have this right, we’re just putting the policies

in the record so Your Honor understands that there are policies and they have these words in them. It's a coverage court that will ultimately decide that. But one of the rights we have is a right to associate in the defense of claims. The TDPs are not going to defend claims by and large, except that one for the Manville Trust and maybe one or so here or there. They're going to settle them pursuant to the matrix negotiated by the ACC and FCR.

THE COURT: But isn't that a defense? I mean, that's a negotiation. You have to have a claim submitted and then you have to process it. So I don't know whether defense is exactly the correct word, but that's not anything different than happens in the tort system.

MR. BROWN: Sure it is, Your Honor. In the tort system, a case is defended. Lawyers come into a courtroom, plaintiff, defendant.

THE COURT: Well, no generally speaking, most of the cases haven't hit the courtroom and most of the claims have been settled. And virtually every case, I'm not sure about this one, I don't know how far we got with the claims resolution and the settlement history, but most of the cases have been settled. Most of the tort system cases have been settled.

MR. BROWN: Your Honor, most cases, period, are ultimately settled.

THE COURT: Okay. But they're settled without the need for commencing litigation in advance. There is a claim presented to somebody, potentially the debtor outside the tort system, but that doesn't mean that there is a lawsuit that's been filed.

MR. BROWN: Your Honor, we don't need to get into this, but I mean, Mr. Hughes testified --

THE COURT: Okay.

MR. BROWN: -- he's the individual in charge of the defense of Grace in the tort system. Grace had 50 law firms around the country defending these cases.

THE COURT: Yes.

MR. BROWN: They were filing motions, they were taking discovery, they were responding to discovery, they were doing everything that everyone does in a lawsuit.

THE COURT: Okay.

MR. BROWN: The point is, if there's a lawsuit and the case is being defended, it may ultimately be settled, there's an opportunity to associate in the defense of the case. On the other hand, if the case is just being settled pursuant to a matrix, there's no opportunity to associate in the defense.

But again, Your Honor, that's not an issue we're asking this Court to find. Those are coverage issues. I'm just asking --

THE COURT: Okay, but then you're right to raise it as a defense to coverage is preserved.

MR. BROWN: Right. But here's the point, Your Honor, that I want to draw. And the point that I want to make here is that what we're really talking about here is the preservation of our coverage defenses and our remedies, or the breach of our rights. There's a little danger in suggesting that in fact our rights have been preserved when in point of fact, what's really be preserved is our remedy for the breach of the rights.

Now, Your Honor doesn't have to make a decision as to whether the rights have or have not been breached. Again, that's the issue for the coverage case. But I wanted to go through this exercise with Your Honor so that you understand what it is, at least one example, of what we are trying to preserve with Section 7.15.

THE COURT: But that's still a circuitous reasoning, because you don't have a right to a remedy unless you've got a breach of a contract. You don't have a breach unless you've got the right. So if the right to the remedy is preserved, then the right to assert the defense is preserved, and that's essentially what the insurers have. They've got the right to associate, and if the debtor breaches, they have a right to a remedy, which is to deny coverage. That's all preserved.

MR. BROWN: Exactly.

THE COURT: Okay.

MR. BROWN: I don't disagree with that, Judge.

THE COURT: All right.

MR. BROWN: That's what we're driving at. But there's a danger in saying that the right is actually -- I mean, to use an example, if I'm going to sell you a car and we enter into an agreement, you have a right to receive that car. If I give the car to Mr. Lockwood and he drives off to Washington, do you still have a right to the car?

THE COURT: Yes.

MR. BROWN: You have a -- well, it's a matter of semantics then, Your Honor. I think what you have is you have a remedy for my breach of the agreement to sell you the car.

THE COURT: It hasn't changed my right. It's just changed the practical application of how I can collect on my right. So I mean your right is still preserved. You can't have a remedy without a right. So if the right to that -- to associate in the defense is preserved and it's breached, then you have a remedy. But you don't need a remedy if the right is properly exercised.

MR. BROWN: Your Honor, we don't -- this is not, I mean this is not the point I'm trying to drive home. The point is, we are trying through this language and through this proceeding to make certain that the rights we have, the remedies we have, however you want to term it, are preserved.

THE COURT: Okay.

MR. BROWN: Now, there is a ramification. I took Your Honor through a series of facts which the debtors and the plan proponents, they may dispute. I don't think they really can be disputed, about the manner by which we got to where we are today in terms of the exclusion of the insurers from the process pursuant to which the TDPs came about. There are ramifications. Or there may be. Your Honor doesn't have to decide that. But there are potential ramifications in coverage litigation for the exclusion of the insurers from the process. And it is important to the insurers that they have the opportunity to raise that defense and litigate that issue in the subsequent coverage litigation.

THE COURT: What claim has been settled by the TDP? Because as I understand it, the insurance company has the right to participate in the defense of a claim. What claim has been settled by the TDP processes?

MR. BROWN: Your Honor, on Page one of the plan, it says, "This plan constitutes a settlement of all claims and demands against the debtors on and subject to the terms described herein in other plan documents." In other words, Your Honor, the plan itself, and the mechanism by which the plan proponents have decided to deal with asbestos claims, can be viewed as a settlement.

THE COURT: Okay.

MR. BROWN: Not of an individual claim. And that's

really one of the points that I wanted to drive home. Yesterday, Your Honor was talking about --

THE COURT: But that's begging the question. I think the answer is, the TDP isn't settling any claims. It's setting up a process by which the trust mechanism can decide what claims should and shouldn't be paid. And then if whoever has the right at that time to present a claim that has been processed in this fashion to the insurers, does present that claim, then the insurers have the right to decide whether it was done in a fashion that comports with the insurance policies or not.

MR. BROWN: Your Honor, that is certainly one scenario pursuant to which the coverage issues could come up.

THE COURT: Okay.

MR. BROWN: And I think that that's certainly one that Your Honor has focused on in the past. But the other scenario is that the actual overall global resolution, as reflected in the plan, to the exclusion of the insurers in and of itself -- in other words, Your Honor, you shouldn't expect that there is going to be a separate piece of coverage litigation for every single claim that gets run through the trust, okay? The reality is, is that if and when this plan gets confirmed, one of the things that the insurers may well decide to do is to file a declaratory judgment action against the trust. And in that declaratory judgment action, take the

position that their exclusion from the process pursuant to which this whole mechanism was established in and of itself gives rise to coverage defenses. Your Honor doesn't have to decide that. And we're not asking Your Honor to decide that. That's a coverage issue. And the important thing for our purposes is that that issue be preserved.

THE COURT: I don't even see necessarily why it is a coverage issue. Until there is a claim presented to the insurers by which the insurers have an obligation under the policies to determine whether there has been a breach that would give rise to a defense, I don't see that there's a coverage issue. So I can't even agree with the basic premise that that's a coverage issue. You need to explain to me what I'm missing. I do not see that as a coverage issue.

MR. BROWN: Well, Your Honor, it is not infrequent in coverage litigation when it appears as though the insured is going to be submitting claims that the insurer files a declaratory judgment action.

THE COURT: Okay.

MR. BROWN: I'm not saying waiting until a claim comes in, but we could. The first claim comes in, let's assume the plan gets confirmed, the first claim gets tendered to the insurers. The lawsuit isn't going to be necessarily I'm not going to pay that claim for X, Y or Z reasons. The lawsuit could be much broader than that, because you're not going to

have a series of covered -- pieces of coverage litigation over and over and over and over again. These things get decided in big cases.

THE COURT: Okay.

MR. BROWN: And so the point here is that there --

THE COURT: But you still have to have a coverage issue.

MR. BROWN: Yes.

THE COURT: Okay. So how is the formation of a TDP a coverage issue? The insurers, to the extent that there is -- well, there isn't an analogy that I can think of. Maybe there is one, but I can't come up with one that would fit this squarely so I'm at a loss for that at the moment. But the undertaking by a group of entities to set up a process to adjudicate claims, in and of itself doesn't impact the coverage. What impacts the coverage is the fact that a claim actually gets processed through that system and then gets presented to an insurer. So if you have a declaratory judgment action on the basis that a claim at some point is going to be presented to the insurer, but you still need to know whether or not that claim is even going to be processed through that particular policy. And if your excess insurance carriers -- at some point, I would expect that your excess policies are probably going to be tapped because there is a lot of money that's expected to be paid to tort victims. But that could be

a generation from now. So whether rights and liabilities can even potentially be affected is pretty speculative. But to the extent that it can, it has to be considered in light of the claims that would be submitted, doesn't it?

MR. BROWN: Well, Your Honor, I can't predict the future on necessarily how this is going to transpire in coverage litigation. I can tell you various scenarios in which it might come up. It is conceivable that the trust, post confirmation, would initiate coverage litigation against all of the unsettled insurers. There's a -- I can tell you that that happened prepetition with the debtors, so it's certainly a possibility that that happens. That puts the coverage issues immediately in play. Okay?

Similarly, the insurers could do the same. The DJ can go either way. It can be filed by either party. So you're right, it may not necessarily happen, but it certainly can happen. And the plan itself contemplates the preservation of coverage defenses that arise by virtue of the manner in which the plan was negotiated. And indeed, Your Honor, the operative language on that particular point is in the definition of asbestos insurer coverage defenses. Because that says, "shall mean all rights and defenses at law or in equity that any asbestos insurance entity may have under any asbestos insurance policy, asbestos insurance settlement agreement, asbestos in place insurance coverage or applicable law to a claim seeking

insurance coverage." Asbestos insurance coverage defenses include any defenses based on the terms of the plan or the plan documents or the manner in which the plan or plan documents were negotiated. Okay?

THE COURT: All right. So they're giving you a defense.

MR. BROWN: They are. As they should. It's not giving us a defense. We have that defense.

THE COURT: Well, I'm not sure. But okay.

MR. BROWN: But again, that's for a coverage court to decide.

THE COURT: No, I don't actually think it is. To the extent it's not a coverage defense, I'm not sure that the whole issue at this point in time is a relevant issue. The problem I think is that the insurers -- I haven't read all the policies, Mr. Brown and I don't purport to have read all the policies, so if there's something out there that I'm missing, feel free to jump in at any time, because I haven't even attempted to read all the policies. But the policies that I have looked at seem to involve a process where individual claims will be presented to an insurer and an insurer will have the right to determine whether to associate in that defense, whether to settle the claim, whether to pay it. Anything that insurers typically would do. But it's on a claim by claim basis.

So now we've got a process by which more than one

claim at a time might be presented, but that was true prepetition as well where more than one claim could be resolved against an insurance policy. But nonetheless, the insurer has the right to look at each individual claim and determine whether there is coverage and whether there has been a breach that would abrogate the need of the insurer to pay for that claim. I'm really missing what isn't preserved.

MR. BROWN: Your Honor, I'm not sure that there's -- well, let me back up and try to tackle this. The question I don't think is whether it's preserved. The question is whether it's clear that it's preserved. And in answer to your question, I mean, Your Honor, we don't want to get into coverage issues, I understand that you don't, and we're not asking you to do that. I'm not asking you to accept that these are viable coverage defenses, because that's what a coverage court is going to do. I mean, that's why we're here. We're here trying to excise from this proceeding those issues which we all agree should be taken care of in the coverage litigation.

THE COURT: Right.

MR. BROWN: And it does not necessarily work the way Your Honor described in coverage litigation, that, you know, we just deal with these things on a claim by claim basis. They are often dealt with on a much more global basis.

THE COURT: Well, I think I said that. But the

policy issue is a claim by claim adjudication. How you choose to deal with them may come in in more than one claim at a time, but, you know, the debtor may say -- I'm talking about individual claims. There may be other types of coverage, but I'm not attempting to address anything other a personal injury claim, and I think that's what you're trying to address too, correct?

MR. BROWN: Yes.

THE COURT: Okay. Each claimant who claims against the debtor or against the trust has to substantiate that in fact they suffered the injury that would be covered by the policy. If they can't substantiate that, they have no right to payment from the trust at the outset. The second level is that the trust, or whoever's holding the policy, then determines if that entity says that there's a legitimate claim, that there's a right to insurance coverage and they make a demand on the insurer. So, yes, it may come in that you've got more than one claim at any time, but the policy, I think, still covers individual claims. You wouldn't just say that any, you know, 400 people can come in and make a demand without meeting the terms of the policy and showing the liability on behalf of the insured, correct?

MR. BROWN: I'm not sure I understand the question, Your Honor.

THE COURT: You wouldn't just go on down the street

and pull 400 people off the street and say, okay, here, make a claim against the insurance company. That's not what the policy is intended to cover. It's intended to cover the debtors' liability. The debtors' liability has to be adjudicated on a claim by claim personal injury basis. Each claimant has to substantiate that they have got the right to claim against the debtor and then the debtor has the right to demand coverage from the insurer. So even though you may process it on a more than one claim at a time basis through settlements or agreements or whatever, at bottom line, each individual claimant is what the policy is intended to cover, isn't it? Am I missing something?

MR. BROWN: Well, Your Honor. I don't know. Let me put it this way, because I want to sort of cut to the chase here. I mean, there can be coverage defenses that would arise as Your Honor has described on a claim by claim basis. Certainly there could be that. And there can be coverage defenses that arise on a much more global basis based upon much more broad principles than what Your Honor is articulating. We don't -- I'm not asking you to get into those. The point I'm trying to drive at is that in this Phase I of this confirmation hearing, we're being asked to stand down because this is not a process that is supposedly affecting our rights. And the important thing, the thing that we have to make certain of, is that if that's the case, that we will have our defenses,

coverage defenses and remedies preserved. That's the point.

THE COURT: And I agree. But the problem is, if I don't understand where you're coming from, I don't understand where there is a lack in preserving those defenses in the language that exists. So you've got to somehow or other show me what I'm missing so that I can understand the point that you're making. That's all I'm trying to do. I'm not trying to adjudicate any coverage issue.

MR. BROWN: I can give you the example, Your Honor, that Mr. Lockwood gave us last Thursday. Well, it relates to 7.15(f). You heard a lot about this yesterday, Your Honor. 7.15(f) is the provision of the plan, the neutrality provision, that introduces this concept of asbestos insurer coverage defenses. And I think one of the things that the insurers are concerned about is whether that language is being used for some mischievous purpose on the part of the plan proponents. Now, I raised at the pretrial, Your Honor, a possible defense that the insurance companies might wish to assert. And that was that the process by which the debtor settled its asbestos liabilities, resolved its asbestos liabilities with the ACC and FCR, was the product of collusion. And the concern that under 1129(a)(3) that somehow because Your Honor has to find that it complies with 1129(a)(3), that that finding could then be used to preclude the insurers from asserting the defense I just described. And Mr. Lockwood got up and frankly said what we

wanted him to say, and that is, it doesn't. And the concern we have is that while he says that for that particular defense, it's not entirely clear in the language that that's in fact what was intended.

Mr. Giannotto and Mr. Millner, both yesterday, talked about the difference between using the language that they use in the asbestos insured coverage defenses and having a rule that, you know, the confirmation of the plan can't be collaterally attacked. I think we're all in agreement that we're not going to be able to, and shouldn't be able to necessarily go into a coverage court and say, the plan didn't comply with the bankruptcy code and Your Honor can probably imagine what kind of reception that would get by a coverage judge. What do you mean? I mean, that's not an issue. The issue is whether the confirmation of this plan can be construed as cutting off various coverage defenses. And that's really what we're concerned about on that particular point. And that's where we think the plan -- is one of the areas where we think the plan is particularly unclear.

That needs to be fixed. It can be fixed, and I think what Your Honor heard yesterday is that there is a fair amount of agreement, not entirely. I mean, you know, if parties are going to sit down and discuss it, we may have differences. But Mr. Lockwood and Mr. Bernick, both -- the theme of both of their presentations were, don't worry insurance companies, your

defenses are preserved. And what the insurers are concerned about is that that's not entirely clear. And as I started with at the outset of my presentation, the concern is, if the plan proponents themselves don't understand this language, okay, what's the chance that a coverage judge that doesn't have the benefit of the Bernick/Lockwood tutorial on 7.15 is actually going to understand it. And that's what we're driving at. And that's where the problem is.

Now I can give you -- because, Your Honor wanted to run through another example, and this is a slightly different example, but it impacts one of my clients, Seaton. And it was kind of glossed over yesterday. Mr. Lockwood, in his presentation, told you at the outset that there are three types of insurers in this case. He said that there were those that were settled prepetition, and he said there are the asbestos reimbursement carriers, Phase II, and then he said there are the unsettled insurance carriers. He mentioned, but sort of glossed over the fact that some insurers fall into more than one of those categories. And one of my clients, Seaton, is one of those insurers, at least according to the plan proponents. I'm not sure we agree with their description, but be that as it may, they view us to be in two buckets. And that's Seaton Insurance Company, Your Honor.

Seaton Insurance Company is a settled asbestos insurance company. At least it appears on, I think it's

Exhibit 5. But when you look at Exhibit 5 you'll find that they have construed the status to be limited to products coverage. Which mean indirectly that what they're saying is that there is some type of residual coverage that may be available under the policy that the trust may wish at some point to try to tap. And so what that means, at least again from their perspective, is that Seaton is a settled insurer and it is also an unsettled insurer.

Now, if you look at 7.15(a), which was discussed at length yesterday, the language that Mr. Bernick pointed out to you after the windup clause is in fact drawn from your decision in Combustion Engineering. The windup, of course, says except to the extent provided in this section, 7.15, which therefore appears to refer to all the rest of 7.15, which would include 7.15(b). And 7.15(b), we're told, was put in there in an abundance of caution. There is a phrase in 7.15(b), Your Honor, that says the beneficiaries of the Asbestos PI Trust. That is not a defined phrase. And I asked Mr. Fink, in his deposition, what his understanding of that meant. And frankly his understanding of that was consistent with my own, and that is if you are something that's defined as an Asbestos PI Claimant, you're a beneficiary of the trust. Well, the definitions in the plan work in such a fashion, Your Honor, that if you are an insurer with an indemnity claim, you have either an indirect PI trust claim or you have a new type of

claim which is described in the TDP, it's called an indemnified insurer TDP claim.

It doesn't matter for purposes of this argument which you are. There doesn't seem to be agreement on the plan proponents' side as to which the insurers are in. But they're in one or the other. And both of those fit within the definition of Asbestos PI Claim. And Mr. Fink testified that his understanding of this language was that if you have an indemnified insurer TDP claim, then you are a beneficiary of the trust. And under B, if you are a beneficiary of the trust, you are bound by the plan.

So what happens with all the protection provided in A is taken away by B. Now, Mr. Lockwood says, well, it depends what capacity you're coming in. And if you come into the court and you're wearing your indemnified insurer TDP claimant hat, then you're bound. But if you come in just holding your insurer hat, you're not bound. That's not going to be clear to a coverage judge, Your Honor. I mean, that's just ridiculous.

These are the kinds of problems we're talking about. And the bottom line, Your Honor, is that having sat through everything that we sat through yesterday, Mr. Bernick says that the purpose of 7.15 is that our defenses are preserved, whatever they are. Mr. Lockwood pretty much says the same thing, subject to a couple of exceptions. There's the reimbursement insurers Phase II, there's the assignment issue,

that's also Phase II, and then there's this concept of asbestos insurer coverage defenses, which it appears the plan proponents mean simply that you cannot collaterally attack this Court's confirmation order, which by the way, we wouldn't be able to do anyway.

So the question is, can we make this language clearer? Now I don't know -- Your Honor can't force them to change the plan, I understand that. But Your Honor has control of the confirmation order and Your Honor has control over whether the plan gets confirmed. And if the plan proponents themselves don't understand this provision, you don't have to confirm a plan.

And there's a lot of ways that this cat can be skinned. One way it can be skinned is through a stipulation which was discussed yesterday that's agreed upon and we all live with. One way is through the confirmation order that we clear up these ambiguities. But on that score, I just want to point out that 7.15(a), by its terms, purports to preempt the confirmation order.

THE COURT: I know it does, and frankly I don't think it can, nor will I sign a plan that attempts to do that. So that is a problem.

MR. BROWN: I thought you might find that that was a problem in light of your comments at the pretrial, Your Honor.

The other problem I think that we have, at least at

this stage in the proceeding, is both Mr. Lockwood and Mr. Bernick went through 7.15 in painful detail yesterday. And I think the common theme that Your Honor kept hearing was that large sections of 7.15 were issues in Phase II. And indeed, if you go through each of the subsections in the Insurance Neutrality Provision, you will find that some are clearly Phase II, some are partially Phase II, some are -- I'm not sure any are completely Phase I. I mean, you could look at 7.15(a) and other than the windup clause, I would agree that the language there is a Phase I issue. With respect to 7.15(c), again, other than the windup clause, I would say that too is a Phase I issue.

Once you get beyond those two, Your Honor, I'm a bit perplexed as to what we're in Phase I and what's in Phase II. And they're trying to use Section 7.15 in order to deal with a variety of what they're calling neutrality issues that pertain to issues that are going to be or may be litigated in Phase II of the confirmation hearing. And I would submit that I don't see how Your Honor could make a decision on this issue at this point the way that they want you to parse this out.

THE COURT: Okay.

MR. BROWN: Thank you.

THE COURT: I understand when you raise the collusion issue, that put in context the type of global issue that you're attempting to raise. So now at least I understand the issue

that you're raising.

MR. BROWN: Okay. Thank you, Your Honor.

THE COURT: Okay. Any other insurer who wants to be heard today? Mr. Shiner?

MR. SHINER: Good morning, Your Honor.

THE COURT: Good morning.

MR. SHINER: May it please the Court, Michael Shiner for AXA Belgium. AXA is an extremely high level excess insurer. We'll offer a declaration of Eileen McCabe later today with some policy related materials that have been agreed to by the ACC's insurance counsel. Essentially there are three policies at issue. A 77-78 alleged policy with an attachment point at 100 million. Another one in 78 and nine again with an attachment point at 100 million.

MR. LOCKWOOD: Mr. Shiner, could you please speak a little louder? Even with the microphone, we can't hear you.

MR. SHINER: Sure. Sorry, Mr. Lockwood.

THE COURT: Jan, can you turn that mic up, please? You can adjust it there Mr. Shiner.

All right, 77-78 policy with 100 million and that's where I lost you.

MR. SHINER: 78-79 policy with an attachment point at 100 million, and an 84-85 policy with an attachment point in excess of 75 million. These are completely unsettled policies sort of in the same vein as Mr. Brown's clients. No claims

have been submitted, tendered yet to AXA on these policies.

You know, I'm not going to replow everything that Mr. Brown has done, but suffice it to say that it's clear the insurers are a significant source of funding for this plan and the trust. It's also clear that the insurers weren't invited to participate in the formation of the underlying documentation or the deal that's brought us all here today.

As you said repeatedly, the one thing you got right in the Combustion opinion was the Insurance Neutrality language and the gold standard, as we all like to refer to it. I think it's important to just take a minute and refer back to that language from CE for a second, because there's something about the shortness and the simplicity of what you wrote in CE that sort of draws into contrast and highlights some of the problems with the Insurance Neutrality Provisions in the current plan.

As you wrote in CE, "Notwithstanding anything to the contrary in this order, the plan or any of the plan documents, nothing in this order, the plan or any of the plan documents, including any provision that purports to be peremptory or supervening shall in any way operate to or have the effect of impairing the insurers' legal, equitable or contractual rights, if any, in any respect. The rights of the insurer shall be determined under the subject insurance polices," et cetera, et cetera. When we compare that to 7.15, we can find each of your pieces from CE tucked into the different sections. But

yet when we start with 7.15(a), we start with, "except to the extent provided in this Section 7.15." So basically, you know, yes, you can have CE, except to the extent we take it away in the rest of these provisions.

Now, 7.15(b) tells us that the plan, the plan documents and the confirmation order will be binding on the debtors, the reorganized debtors in the trust, and that the obligations, if any, of the trust, to pay the holders of the asbestos PI claims, shall be determined with the plan, the plan documents and the confirmation order.

So if you read this section with the carve out later on from asbestos insurance coverage defenses, can an insurer in subsequent coverage litigation, and I think this was a point Mr. Brown was trying to get to, challenge the appropriateness and the reasonableness of the entire deal that's put together. In Mr. Lockwood and the plan proponents' brief clearly make the point that, you know, an individual claim, when it's tendered to an insurer for payment by the trust, well, you can raise all of your coverage defenses then. But, you know, the assignment's happening now. The assignment's happening when Your Honor confirms this plan. The assignment is expressly carved out from insurance neutrality.

So even if my policies, my client's policies, which are being transferred now, even if they're not going to be accessed for years, there's an assignment going on, and that

assignment and these provisions here in 7.15 can operate to cut off rights now. They can operate to cut off what defenses can be asserted now. And that, I think, Your Honor, you were asking, where's the issue with something that's happening to the insurance company that's going to give them a right to possibly assert a defense? Well, their rights are being transferred, their potential defenses are being cut off now. And I think that, you know, when one attempts later on if we sit and wait, as Your Honor suggests, until there's a request for coverage, a request to pay a claim, we run a big risk that these defenses would be perceived as the falling in that collateral -- no collateral attack on the confirmation order exception.

And I'm not saying we want to collaterally attack the confirmation order, but we do need to make sure this construct which, you know, with one, two, three, four, five, six, seven, eight, nine, ten sub parts is intelligible to a Court that's going to be figuring out what's going on in the future, and to the parties who are trying to work with it and understand what's happening to their rights. Because I think to confirm this plan, this Court has to feel that it understands how each of the provisions of the plan operate. How else are you going to be able to make the findings that are required under 1129?

THE COURT: All right. If B were fixed to say that the plan documents and the confirmation order shall be binding

on the debtors, the reorganized debtors, the Asbestos PI Trust and the personal injury beneficiaries of the Asbestos PI Trust, does that fix B?

MR. SHINER: It might. I can't tell you right now without sitting down and thinking about it --

THE COURT: Yes.

MR. SHINER: -- and going through a lot of different scenarios with my co-counsel.

THE COURT: Because I think the problem may be that the definitions -- well, if there is a problem -- I think from the insurers' perspective, the problem may be that not every term is a defined term and you can't define every term, because otherwise you'd never get through the plan. But maybe --

MR. SHINER: We already defined too many terms in this plan.

THE COURT: -- so that may be an issue where to the extent that Mr. Lockwood and Mr. Bernick both say that this is essentially overkill is a way to make sure what the Neutrality Provision really does. And the intent is to have the personal injury claimants govern, because the next sentence then talks about the fact that the trust would pay the holders of those claims according to the plan, the plan documents and the confirmation order. That clearly is not something that is binding on the insurance companies, that's a direction to the trust as to how to pay the claims.

So to the extent the trust acts in derogation of the policies, at that point, your defenses clearly are preserved. So perhaps the “fix” for B is to make it clear who the beneficiaries are.

MR. SHINER: It may be a potential fix. I mean, I think there’s an inherent structural problem in the insurance companies and the -- an inherent structural problem in the trust inasmuch as it exists to -- it states it has fiduciary duties to the PI holder, ths holders of Asbestos PI Claims and future demands where your insurance companies are being forced into that situation given the natural -- into that definition -- given the natural adversity between the two types of groups and how, whether there could be a fiduciary obligation and trustees could fulfill fiduciary obligations to both of those groups.

THE COURT: Well, are you talking about the trustees or the TAC? Because the Advisory Committee -- I understood that the issue involved the members of the Advisory Committee and not who the trustees are going to be. And I guess that’s where my issue or my concern, I guess, will be as to what those independent fiduciary obligations are. The trustees’ may be different from the TAC’s.

MR. SHINER: I think the trustees and the TAC sit differently. But, I think the trustees generally are, you know, to answer the question, to the benefit of all of the

potential beneficiaries, claim holders who are seeking to receive distributions under the trust while the TAC exists for the benefit of the present claimants under the trust and, you know, the FCR is out there and will be for the benefit of the future claimants under the trust, theoretically, each the TAC and the FCR watching over their respective -- you know, at least advocating, I guess, to the trustees for their respective group of claimants.

But, again, I query whether if insurance claims are going in there, and this is something that has just developed to me as we've been going through this exercise over the last day and a half, whether the fiduciary duties that are supposed to be exercised by the trustees as to all claimants when those claimants include both insurance companies and, you know, personal injury claim, and structurally, that's something that can work.

THE COURT: Well, okay, I mean, again, somebody is going to have to inform my understanding probably better than I have it right now, but the way the insurance company should have, I'll call it an indirect claim, is because it paid something that would have been a direct claim. So, essentially, you're being substituted for who would have been the beneficiary but for the fact that the claim had been paid by the insurance company.

So, I'm not sure how, in that sense, the fiduciary

obligation of the trustee changes because the trustee would have had to evaluate the claim and pay the claim. So, it's the same problem that the insurers face which is the liability is already fixed because the policy period's expired but the claims are already there. So, the fact that you then assign the right to the proceeds doesn't change the risk.

Well, conversely for the trust, it doesn't change the fiduciary obligation because the obligation is to pay the claim, whoever holds the claim is entitled to be paid. So, I'm not sure I see a conflict there, specifically. If you have a different status that's coming into the trust, that may be an issue.

MR. SHINER: Well, you know, as we proceed a little bit further down through the section, you know, I think we also run into another structural problem with this insurance neutrality provision when we're attempting to address, you know, the protection that's being provided under 7.15D for settled asbestos insurance companies where we're protecting them from contribution claims, or the debtor is protecting them from contribution claims. Here, it might be brought by, you know, unsettled insurers who are, you know, required to pay a claim in the future.

Now, I think a contribution claim comes up when, you know, an insurer pays a claim and they feel that there's somebody else out there who is responsible for all or part of

that claim, so they make a contribution claim, typically by filing a lawsuit against the people that they believe are also responsible for those claims. I'm told by the coverage lawyers that I work with -- you know, I don't do this on a regular basis, you know I'm a bankruptcy lawyer -- that these are very common in the coverage world and that, you know, they can be made against all sorts of parties, not just against other insurance companies, but also against, you know, the holders of the insurance policies for various reasons they might have years where they have responsibility against third parties who might also be responsible, as well.

And, you know, what we have again is an injunction that's prohibiting us from asserting these claims, at least against certain defined groups, maybe not all of the groups. We have the effect of the discharge and that the discharge injunction as to whether or not these claims can be asserted against the reorganized debtor. And we have claims against potential third parties, as well, and then we have injunctions protecting other third parties here, as well.

Now, there's a judgment reduction clause. So, what you're doing in the neutrality provision is taking the insurer who has a bundle of rights right now and you're taking that bundle of rights and you're trimming it off and you're saying well, no, you can't have this, and you can't have this, and you can't have this, but we'll give you a judgment reduction clause

and, you know, hopefully that will address and provide protection for you.

And I think the situation again is, you know, we're sitting here and saying, is this neutral, is this protecting the insurance companies the same way, you know, the gold standard does? And then we look at the gold standard. It's simple. I think it's three sentences long and it makes its point. Here, we have all of these subsections attempting to interrelate and the more and more we look at them, the more and more that bundle of rights that our client has are being trimmed off one after the other, after the other to pigeon hole him into the smallest area possible and obtain certain advantages for whether it's the trust later on or at least, you know, with respect to eliminating coverage defenses like, for instance, the assignment provision where we preempt that out, we're going to take that away.

And I know there are Phase II issues here, there are Phase I issues here and that adds to the additional confusion of trying to understand exactly what 7.15 does because what we're dealing with 7.15A today and 7.15C but, you know, 7.15I has been pulled out and various sections have been pulled out. We had the interesting chart yesterday. But, it makes the interpretation and the determination of what the effect of this is on our clients, extremely difficult, and it really calls into question whether we're being provided the neutrality,

whether we're getting, as you said the Circuit said, the one thing you got right in CE was making sure there was no effect on these insurers. Well, the more and more we go through this, it's affecting these insurers. And, again, I'm not trying to replow the ground that everyone else has covered, but I did want to make these points.

THE COURT: Any other insurer? Okay. I'll have some brief rebuttal, and I do mean brief, because I heard the arguments for three hours yesterday so I understand the plan proponent's position.

MR. LOCKWOOD: Believe it or not, Your Honor, I think this is going to be brief. First, I would just like to address Mr. Shiner's last point which is essentially, as I understand it, that we should just have the CE provision all by itself. And, in effect, he points out to the Court that the fact that we have put in the provision -- one of the things that we put in the provision was the carve out for the protection for settled insurers of contribution claims against them under the 524G injunction. So, as I understand Mr. Shiner's proposal, we should use the CE language and that language would mean that it overrides the 524G protection granted settling insurers because nothing in the plan or the confirmation order, whether it purports to be preemptory or super meaning, shall interfere with the insurers' coverage rights, in effect, short form.

THE COURT: But, if they settled, they've already

agreed to what those rights are.

MR. LOCKWOOD: No, but Mr. Shiner -- Mr. Shiner is a non-settling insurer.

THE COURT: Yes.

MR. LOCKWOOD: He has come to this court and said I want to bring contribution claims against settling insurers and he says we need -- I need to be protected by the CE insurance neutrality language which doesn't say, in its terms, that a non-settling insurer cannot sue a settling insurer. So, under his reading -- under what he proposes, a settling insurer that's gotten the protection of a 524G injunction could, under CE, if there was no carve out for the injunction, sue a settling insurer for contribution.

There's a lot of settling insurers on this side of the room. I don't think that they're of the view that the Court in Combustion Engineering -- or you, in Combustion Engineering in approving the CE language in effect said, this insurance neutrality provision overrides the 524G injunction.

THE COURT: No --

MR. LOCKWOOD: I don't think you intended it to override it. I don't think --

THE COURT: -- I don't think it could override it.

MR. LOCKWOOD: Well, if you say nothing in the confirmation order, or the plan, or the plan documents that purports to be superpreemptory or -- let's look at the language

again, Your Honor, which we took from Combustion Engineering.

THE COURT: Well, the issue then would be simply that somebody would be bringing a lawsuit against an enjoined party and the defense would be that the confirmation order prohibits that injunction, and that suit would probably come here. That probably wouldn't be a coverage action. That would be an issue as to whether or not the plan was being carried out appropriately. So, I'm still missing the point.

MR. LOCKWOOD: Your Honor, I'm going to put your -- the language from CE on the Elmo here. You raised a question earlier about the fact that in 7.15A it referred to the confirmation order.

THE COURT: Yes.

MR. LOCKWOOD: And that was a problem?

THE COURT: No, it says --

MR. LOCKWOOD: Well --

THE COURT: It says that -- I'm sorry, that's not what I meant, and yes, I may have said that, Mr. Lockwood, I apologize. That's not what I meant. What I meant to say was that nothing in the plan is going to say that it overrides the confirmation order. That kind of plan I can't confirm.

MR. LOCKWOOD: I understand that.

THE COURT: Okay.

MR. LOCKWOOD: And all we're saying is that there's a provision in the plan by which the plan proponents, themselves,

agree that nothing in the confirmation order would take away insurance rights. Now, all that's saying is what the plan proponents are agreeing to. And the reason that that language was in there, the reference to the confirmation order, is because the insurers have insisted that it be in there. Why have they insisted? If you look at the language of Combustion Engineering itself, it says notwithstanding anything to the contrary in this order.

THE COURT: Right.

MR. LOCKWOOD: This order was the confirmation order.

THE COURT: Yes.

MR. LOCKWOOD: That's where this language appeared.

THE COURT: And that language will have to go into neutrality --

MR. LOCKWOOD: Okay.

THE COURT: -- in the confirmation order in this case, too.

MR. LOCKWOOD: I agree.

THE COURT: Okay.

MR. LOCKWOOD: I agree. But, now let's look -- what else is in the confirmation order? The 524G injunction.

THE COURT: Yes.

MR. LOCKWOOD: So, this says, notwithstanding anything to the contrary in this order --

THE COURT: Yes.

MR. LOCKWOOD: -- including the 524G injunction shall in any way operate to or have the effect of impairing the insurer's legal, equitable or contractual rights in any respect. What Mr. Shiner is arguing -- let me -- what we're trying to do is to clarify things that we think the CE language itself, with all due respect to the gold standard, might possibly have some internal inconsistencies in it. And what Mr. Shiner is doing here is pointing up one of those internal inconsistencies because the confirmation order contains a 524G injunction protecting settling insurers.

THE COURT: Okay.

MR. LOCKWOOD: And that protection includes not being sued for claims arising out of asbestos personal injury claims asserted by non-settling insurers. Okay?

THE COURT: Okay.

MR. LOCKWOOD: So, we say -- we put in the exception clause in our language that says, "Except if provided in Section 7.15." One of the exceptions that we have put in that Mr. Shiner was just complaining about was -- pardon me, I'm rooting around here -- Section 7.15D is one of the exceptions, and what does it say? It says, "Nothing in the plan or the plan documents shall affect, or limit or be construed as affecting or limiting the protection afforded to any settled asbestos insurer's company by the asbestos PI channeling injunction."

What we're trying to do, and what Mr. Shiner, if his coverage gets settled in this case would want us to be doing, is to say that the superpreemptory provision from CE doesn't override the 524G injunction. And yet if you look at the literal language from the CE order which says nothing -- notwithstanding anything to the contrary in this order, couldn't that be read, notwithstanding anything to the contrary in this order which includes the 524G injunction, couldn't that be read, arguably, to override the 524G injunction? The answer is, read literally, it not only could be read to override it, it does override it.

But, we don't think that either the Third Circuit, Your Honor, or indeed, any of the settling insurers would think that that was a reasonable or sustainable interpretation of the CE language, and in many of the cases in which Mr. Shiner and I have made deals under which his clients have become settling insurers, I don't think Mr. Shiner in those cases would be making that argument.

So, that's, I think, a telling illustration of one of the reasons why this version of the CE language has provisions in it that contain clarifying carve outs to make very precise what we think the Court intended in the CE superpreemptory language which we have attempted to incorporate with these clarifying modifications in this plan. And, in particular, I think the argument Mr. Shiner made about contribution claims

falls within that. That's point one.

Point two is, Mr. Shiner admitted, as Mr. Bernick pointed out in his chart the other day, we have agreed repeatedly that issues of the scope of the injunction, the scope of the releases, the scope of the exculpation, whether the insurers, in fact, have some kind of claims or rights not related to their coverage obligations but claims such as contributions that are Phase II issues and that's for another day. And so I don't know how many times we have to say it in open court before the insurers will accept the notion that we're not here to re-argue those types of claims today.

I'd like to go back now and briefly touch on some of the points that were made over the last full day, including yesterday afternoon and today. And I agree with those insurance counsel who said, when you really sift through all of this, there's not all that much dispute once we've sort of clarified the standing of people to raise claims and rights being impaired that are not coverage defenses being impaired in Phase II.

Virtually, all of the insurers, including Mr. Brown again this morning, have seized on the language of 7.15B which talks about the plan beneficiaries which Your Honor was just discussing a few moments ago and whether it might be changed and whether it's confusing. I, as Your Honor I'm sure recalls, made the point in my original presentation that the reference

here to the beneficiaries of the asbestos PI trust could, under some theoretical circumstances or hypothetical circumstances, include insurers and it can because if an insurer has, and as Mr. Brown pointed out, an indemnified claim under the TDP, it's Section 5.12 or 5.13, that claim will be brought against the trust pursuant to the channeling injunction and in that capacity that insurer will be bound by the plan, by the TDP.

I mean, it says -- the TDP expressly provides provisions as to how those claims will be resolved and paid by the trust. And in that capacity, which Mr. -- I must say, Mr. Brown's argument that you need to look at the capacity that an insurance company is acting and whether they're wearing a hat as a claimant or wearing a hat as an insurer is ridiculous. With all due respect, it's his argument that's ridiculous. I mean, he knows perfectly well that if his client -- he comes in here as representing a settled insurer and announces that he's got an indemnity claim against Grace and complains that it's being channeled to the trust and not paid by Grace as a Class 9 claim. That's a Phase II issue that we're going to face, but that's what he's here for.

And he knows perfectly well that that is a different kind of capacity in this case as some insurance carrier who's asked by the insurer -- excuse me -- by the trust to live up to its insurance obligations. There's nothing ridiculous about making that distinction. In fact, if we're going to talk about

clarifying this provision, what we ought to do is after the words “beneficiaries of the asbestos PI trust,” we should put, “in their capacities as such.” Would that explain what we’re talking about, Your Honor?

THE COURT: The beneficiaries of the asbestos PI trust in their capacities as such? No. That doesn’t --

MR. LOCKWOOD: Because it would point out that they’re talking about that the plan only binds people when they are, in fact, acting as a beneficiary of the trust.

THE COURT: In other words, when they submit a claim.

MR. LOCKWOOD: When is an insurer acting -- let’s --

THE COURT: When it submits a claim.

MR. LOCKWOOD: Yes.

THE COURT: Fine. Then say that, the beneficiaries of the asbestos PI trust who submit claims to the trust.

MR. LOCKWOOD: Well, okay.

THE COURT: Claims or demands.

MR. LOCKWOOD: We could do it another way. That’s another way of doing it. But, the point is that what the insurers -- what Mr. Brown and the other insurers that have been here are arguing is saying that this provision should be read as either explicitly or ambiguously, depending on whether they’re talking about clarity or not, as saying that this provision overrides Section 7.15A, C and F, which are the core insurance neutrality provisions in the plan, because an

insurance company who has a claim -- who has a claim, is a plan beneficiary and therefore this says they're bound by the plan and therefore it's an exception to the insurance neutrality and therefore --

THE COURT: Well, it's confusing.

MR. LOCKWOOD: -- the insurance neutrality is completely voided.

THE COURT: Well, it's confusing. It can be straightened out. It can be straightened out by making B, you know, two sub parts, one dealing with personal injury beneficiaries and one dealing with insurers, and to the --

MR. LOCKWOOD: Well --

THE COURT: -- extent that the insurers have to submit a claim or a demand, then it can be carved out. You don't want that limitation with respect to the asbestos personal injury folks because you want everyone who thinks they ever have a claim or a demand against Grace to be bound by this order.

MR. LOCKWOOD: The only point I'm trying to make here, Your Honor, is that this provision is clearly not --

THE COURT: It's not clear.

MR. LOCKWOOD: -- an override.

THE COURT: That is not clear, Mr. Lockwood, that's the problem. Because these -- A, and C and F all start off with --

MR. LOCKWOOD: -- with except.

THE COURT: -- “except to the extent provided in this section.”

MR. LOCKWOOD: So --

THE COURT: And it says this Section 7.15. It doesn’t say 7.15A, 7.15C. It says, “except as provided in this section.” So, I offhand don’t really understand whether it’s attempting to limit those clauses to everything else that’s in this section, or only to the particular paragraph. I don’t think that this is clear. I think it can be fixed, but I don’t think it’s perfectly clear, those -- in that sense.

MR. LOCKWOOD: So, you think it would be a fair reading that having gone to the trouble of putting all these other provisions in 7.15 that the plan proponents, as the insurers are suggesting are sort of deviously written 7.15B to completely vitiate everything else in 7.15 --

THE COURT: No, I don’t --

MR. LOCKWOOD: -- because that’s what their argument is.

THE COURT: I don’t think there’s any evil motive. I’m not attributing any evil motive to anyone. What I’m suggesting simply is this. I think Mr. Brown is quite correct. Everybody’s intent, I’m assuming, is of the highest order. But, the folks in this room aren’t going to determine what the meaning of this provision is if it’s asserted by way of either

affirmative litigation or by a defense.

So, to make it clear what it means, it can be tweaked. It doesn't seem as though the tweak will be that difficult to do.

MR. LOCKWOOD: We can certainly put something in there that says, you know, the plan beneficiaries who submit claims to the trust, or something like. But, the problem I have is that I don't think the insurers will necessarily accept that. So, I guess the bottom line is, we've said we'll talk to them about insurance neutrality language and we'll talk about tinkering with 7.15B. But, the basic -- I take it, Your Honor --

THE COURT: But, the issue with respect to the beneficiaries though is, I think the problem is that the beneficiaries that you're really -- that the trust is going to be dealing with most frequently are asbestos personal injury claimants, not the insurers. The insurers may have some claims that will be processed through the trust, but in that sense, yes, they may be beneficiaries, but I don't think that's what this paragraph, in the form that it's written, is clear about. It is clear as to the personal injury beneficiaries. So, perhaps you just need two subsections, one that deals with everybody but the insurers who may make claims and one that deals with the insurers who may make claims or demands so that you can make it -- that clarify that for the insurers it's

those who are submitting claims --

MR. LOCKWOOD: But, again, it's those who are submitting claims only as claimants.

THE COURT: Fine.

MR. LOCKWOOD: Because --

THE COURT: Right, yes.

MR. LOCKWOOD: -- what the insurers keep arguing is even if we put in it only applies to insurers who are submitting claims, Mr. Brown is going to be up here saying well, I'm going to submit a claim and therefore, 7.15B means that the rest of 7.15A, F -- C and F don't apply to me, and that's not what it says and that's not what it's intended to say.

THE COURT: Right, so you can define that.

MR. LOCKWOOD: So we'll -- you know, we'll tinker with this.

THE COURT: You know, maybe you need a whereas clause that indicates at the beginning of this that there are statuses, different statuses, that the insurers hold and define that fact if that's what would help. I'm not sure, because the more words, I think, sometimes the less clear. But, nonetheless, if the problem simply is that the insurers have different capacities and they want to make sure that this language is only affecting them in their capacity as insurers who submit claims to the trust and not in some other capacity,

I don't see why that's so difficult to put in a --

MR. LOCKWOOD: I don't think it is, myself, and we'd be happy to put that in. I mean, that was what I was attempting to do when I wrote my little, in their capacities as such. If it needs more words to make the same point --

THE COURT: Okay.

MR. LOCKWOOD: -- we're certainly happy to do that, Your Honor.

The other issue -- another issue has to do with the definition of asbestos insured coverage defenses, and in particular to the carve out for the bankruptcy, Romanette (i), the plan or any of the plan documents do not comply with the bankruptcy code. Again, this is another one of these sort of arguments which Your Honor has had, considerably, back and forth with the insurance company lawyers, about, you know, why -- what's wrong with it? I mean, there's nothing -- and as far as I could tell, other than the fact that it's not specifically contained in the language of the CE decision itself, the argument boils down to the proposition that we could somehow or another treat a coverage defense as a bankruptcy code defense.

And, with all due respect, I don't -- nobody has yet articulated, no insurance company lawyer, including the eloquent Mr. Brown, has explained in any meaningful way how this bankruptcy code defense is a coverage defense. I mean, I pointed out yesterday that it preserves all your coverage

defenses and that those include, for example, collusion, which -- and the fact that if you sort of -- you could also make a collusion-like argument on bad faith. All it says is you can't make an 1129 -- an argument that 1129(a)(3) of the code wasn't satisfied. It doesn't say that you couldn't argue collusion. And let's look at the language here. Mr. Brown himself read it to you.

The language that precedes the Romanette (i) says is, "Asbestos insurance coverage defenses include any defense based on the terms of the plan, or the plan documents or the manner in which the plan or the plan documents were negotiated." What does "or the manner in which the plan or plan documents negotiated" mean? It means, that -- Mr. Brown kept talking about, we weren't included in the negotiations. Well, that's part of the manner in which the plan was negotiated. They were excluded. He claims we didn't consent. Well, that's part of the manner in which the plan was negotiated.

The other insurers have made arguments, essentially, that the ACC and the FCR drafted the TDP and the debtors didn't really participate in it, and that sort of smacks of the notion that the debtors violated some insurance policy provisions relating to collusion because they sort of agreed to waive their rights to draft or complain about the TDPs by giving -- and, again, that's either the terms of a plan document, the TDP or the trust agreement, or the manner in which the plan

document was negotiated, both of which are expressly stated to be asbestos insurer coverage defenses.

So, again, it's like what we just went through. They say, well, we're giving you expressly the arguments that you want to make about coverage defenses and then because we carve out a defense that the plan doesn't comply with the bankruptcy code, we've sort of deviously and subtly taken back with the left hand what we just gave you with the right hand. And with all due respect, Your Honor, those are not bankruptcy code defenses. There is no defense in the bankruptcy code, other than bad faith, that says that creditors and debtors can't negotiate the terms of a plan.

Indeed, I believe Your Honor has on other occasions noted that the bankruptcy code contemplates creditors and debtors negotiating the terms of a plan. So, the notion that you can sort of use the, what I'll call, swallow up argument which has been made by some of these insurers by focusing on this Romanette to take away express provisions of the very same paragraph that grants the provisions is, if we're going to use terms like ridiculous, that's ridiculous.

I think Your Honor accurately responded to, and I just want to emphasize the fact, that there is no distinction between having your rights preserved and having your remedies preserved. There is no freestanding right in an insurance policy for an insurer to do something unless the insured has

tendered a claim to the insurer for defense.

And while Mr. Brown is correct that the insurers can certainly go out and file declaratory relief actions about whether various plan provisions, if implemented in the ways that the insurers believe that they will be implemented, violate their policy rights, they certainly can do that under this plan and under the insurance neutrality provisions. Your Honor was also correct that one of the defenses to such an action might very well be, it's not ripe, the trust hasn't decided how they're going to handle any claims, et cetera.

And another point that Mr. Brown made that's related to that in the colloquy that you and he had, has to do with the process in the future by which the trust actually will do things. If we're going to talk about hypothetical post consummation declaratory judgment actions, one could certainly hypothesize the following scenario. The insurers go to some court either with a claim that's been tendered to them by the trust for which there's the demand for payment or in a declaratory relief situation.

And the coverage court says, you know, you can't do it that way, you cannot use expedited review to cut off the insurer's claims handling rights. At that point, the trustees have the power under the plan documents, the trust agreement in the TDP, to amend them and they could do exactly what these insurers say they should do right now which is they could say

okay, we're going to have a new process under which claims are submitted to the insurers before they are processed by the trust at which point you would have now a new set of coverage issues as to whether or not this hypothetical change in the future was or wasn't binding on the insurers and didn't cure the problem.

And Mr. Brown and the others have repeatedly agreed with the point I made at the very beginning of my presentation the other day which is this Court is not being asked to decide coverage issues which means, among other things, that it is not being asked to determine that the TDP expedited review procedures violate the insures' policy rights. The question before the Court in Phase I is a very limited question which is, have the insurer's rights to deny coverage for claims resolved under the TDP been preserved? And the answer I submit to Your Honor is, they clearly have been preserved and there's no lack of clarity about that.

There's been a whole lot of discussion about, which I think was framed actually most cogently by Mr. Brown about the audience for the insurance neutrality provision, and this ties in, I might add, to Mr. Brown's use of Mr. Austern's testimony about an illustration of how complicated and difficult to understand and the poor coverage judge is going to be just totally helpless to deal with this when it's presented in front of him.

And I have two observations to make about that. First, Mr. Brown didn't question Mr. Austern, who was not tendered as an expert of any sort, much less as a 30(p)(6) witness. He didn't ask Mr. Austern how much time he'd spent looking at Section 7.15 and trying to figure out what it meant. He didn't ask Mr. Austern whether or not he had relied on his own counsel for advising him that the provision did or didn't work. All he did was got a sort of spontaneous free form volunteering that based on however little preparation on the subject of insurance neutrality Mr. Austern had undertaken prior to his deposition, that Mr. Austern had at that point in time found the provisions confusing.

And with all due respect to Mr. Austern, the question before this Court is not whether Mr. Austern thinks they're confusing, the question is whether this Court thinks they're confusing. And the question before a coverage court is not going to be the kind of question posed to Mr. Austern, which is Judge X, you've now had the opportunity to hear a variety of evidence on what this provision means. You've heard lawyers argue about what it means. Do you think you understand it after all that? Mr. Austern wasn't asked that question, but the coverage court will be. And --

THE COURT: I don't know why a coverage court would have to construe the provision, at all. If the defenses are preserved, it ought to be coverage litigation, not an

interpretation of Section 7.15. That's the point, I think. The point is to get into the --

MR. LOCKWOOD: What the insurers, I think, are arguing is that the ever devious plan proponent lawyers who have now morphed into trust lawyers in the next round of litigation will be trying to argue various things that are inconsistent with the insurance neutrality provisions and that they will mislead the coverage court into accepting such misinterpretation. I think that's really what they're arguing.

And, in this regard, I would like to read something from the CE opinion in the Third Circuit which although it deals with another issue, I think actually is very informative about the Third Circuit's view about how you deal with the alleged incompetence of subsequent judges to understand what's going on in the case before the bankruptcy court. It says, "The injury complained of here relates to the possibility that a future court will mistakenly rely on the bankruptcy court's valuation of the indemnification claims as zero for purposes of voting and planned confirmation as a ruling on the merits of those claims. We fail to see how this speculative event arises to the level of direct and pecuniary harm required for bankruptcy appellate standing."

The bankruptcy court made clear that the estimation and the value of the indemnity claims was limited for purposes of plan confirmation. To make the point more explicit, the

bankruptcy court did not foreclose the possibility that future litigation might alter its valuation of the indemnities. And then it quotes from your decision.

Based upon these clear limitations on the scope of its findings, we believe a future court will understand the limited relevance of the bankruptcy court's estimations on the operations of those indemnities and the merits of any related claims.

In other words, the Third Circuit was unwilling to accept as a basis for altering this Court's decision on the value of indemnification claims, the possibility that some other court down the road might misunderstand what was going on before the bankruptcy court and what the bankruptcy court was doing. And I would submit to you, Your Honor, that's exactly what Mr. Brown and the others are trying to do here. They're trying to say that even though Your Honor's confirmation order is going to say that, you know, what I'm doing here is confirming a plan and determining it's in conformity with the bankruptcy code, and I have this insured's neutrality language here, that some other court somewhere is going to become confused and misled and therefore you can't accept the language before you, not because they've shown that it doesn't mean what it says, but rather because they want to speculate about it. Some ways, somebody might argue that it doesn't mean what it says to some other court. I mean, that's sort of like saying

that we can't have a contract enforced by a court where there's a dispute about it because other -- some other judge might not understand the contract because it's really complicated.

I mean, the judge -- the duty of courts is to figure out the answers to questions and it doesn't limit itself to the answers to questions that are simple. And I would submit that this really isn't anywhere nearly as complicated as the insurers are attempting to make it look.

Oh, one other point. It was made most strenuously by Mr. Millner the other day, but it's been made by a number of the insurers, which is that the plan fails and this is some violation of neutrality, I guess, to provide that the assignment of the rights under the policies doesn't include the assignment of the -- the assumption by the trust, the obligations. Your Honor, these policies, these unsettled policies are non-executory contracts. It is hornbook bankruptcy law that if you assign a non-executory contract, the assignee takes the contract what they call cum onere. And that term cum onere, as I'm sure Your Honor is familiar with, means that you take it with all the obligations that comes with it. You don't get to cherry pick it and choose oh, well, I'll take the benefits, but I'll just ignore the detriments.

So, the argument that somehow -- and moreover, in those cases where there's a cum onere decision, they don't say and the plan that transferred the executory contract was

defective because it didn't state in the plan, it didn't repeat the cum onere doctrine. It didn't write it into the plan. It says, that's what the law provides, that you take it with the obligations. And what Mr. Millner and others are saying is, well, that may be true, but it would make us feel better if you put in the plan that you take it with all the obligations. Well, you know, maybe it would make them feel better. With all due respect, making them feel better is not a valid objection to a plan provision. That's all I have, Your Honor.

MR. MILLNER: Two minutes. One minute to respond to Mr. Lockwood's last cum onere remark.

UNIDENTIFIED ATTORNEY: Robert. Robert, may we finish our rebuttal?

MR. MILLNER: Oh, sorry.

THE COURT: Mr. Guy?

MR. GUY: Thank you, Your Honor. Jonathan Guy for the asbestos PI FCR. First, I think I join the whole courtroom in wishing your daughter the best.

THE COURT: Oh, thank you.

MR. GUY: The issue today is very simple, is the plan insurance neutral or not for the unsettled insurers? This is a Phase I issue, not a Phase II issue. It's a very familiar issue for the Court. The Court has ruled on it many times. The Third Circuit has ruled on it. And the insurers seem to agree that the point is not whether their coverage defenses are

preserved or not to give them insurance neutrality. They seem to also agree that they want insurance neutrality. What I'm taking away from the collective argument here is that they think some of it is confusing.

As to that, the only thing that I've heard legitimately I believe that is arguably confusing is this issue about beneficiary. Clearly, we can take a look at that and the plan proponents can fix it, if necessary. Other than that, I think we're done.

We've heard a lot about the overall plan being confusing and insurance neutrality treatment being confusing. Talked about my client, Mr. Austern. I want to reiterate what Mr. Lockwood said. Mr. Lockwood was presented by the plan proponents to talk about these issues. The insurers noticed his deposition to talk about those issues. Clearly, Mr. Lockwood is an expert on those issues. He did not notice my client's deposition to talk about insurance neutrality. For them to come into this court and say, well, it's confusing because of his on-the-spot review of that section, is just plain wrong.

Your Honor, on the issue of collusion, I am absolutely certain that no insurer in this courtroom is suggesting that the FCR has colluded with anybody. I do agree with what they did say about him being a well-respected and highly-regarded individual and I agree, obviously, with what

the Court said which is mirroring Mr. Brown's comment that everybody's intent here is of the highest order. That is an issue for bad faith in connection with the Phase II of this case. They can raise what arguments they can raise then and, of course, whatever findings the Court makes with regard to the plan being in good faith which we obviously believe it is, will be those findings and they will be binding.

And as to any other findings the Court makes, those will be binding, too, but they are the bankruptcy court's findings that have to be made for this case to be confirmed. Thank you, Your Honor.

MR. BERNICK: Your Honor, I just have some -- a few remarks and I want to start out by saying that I guess one of the good things about this process as we think about this phasing effort, whether the phasing effort has produced something that's good, I think it definitely has. I think that this is an important area to be able to cover and have some time to think about and deal with before we get to Phase II.

And the other thing that I think is accomplished is that a lot of people have said what I think are obviously remarks that were made in very good faith, that there is more work to be done between the parties here to try to resolve these issues. And I'm very confident in my colleague, Mr. Lockwood and Ms. Esayian, that that work, in fact, will be done. So, nothing that I'm saying now is designed to push back

on the idea that more work can be done.

But, I do think it's -- I do think that it is a little bit important to talk about what the -- what I'm going try to do is kind of set out in a way a couple different types of issues such that if we can't reach resolution, we're clear on what it is that the benchmark really is for deciding these things if they had to be decided on a contested basis. And I think that the principal problem that we have here and the discussion today and yesterday is, people are still not listening to the lesson of CE.

The insurers made a tremendous effort in the CE case, as did others, obviously, but the insurers made a tremendous effort to get the attention of the Third Circuit on this whole issue, and they were successful. They got the attention of the Third Circuit and that was a major, major undertaking. And the CE decision was a landmark decision, there's just no question about it. And, of course, the CE people had to go back and do some more work and pay a little bit more money. The good news is that it all was a success in the end there after an awful lot of work.

But, the real teaching of CE is, in fact, the insurance process. And what CE says, the lesson of CE is that when it comes the question of neutrality, there is one vehicle that is chosen for assuring neutrality, period, and that is the superpreemptory clause. That's it. That is the gold standard

that Mr. Giannotto talked about, it's recognized. It is a standard that we had to follow, and we did. It is the standard that the Court has to follow and has followed in the past and presumably is going to follow again. And the critical thing is that there wasn't some other fix, or some other device or some other additional language that the CE Court said, and you need this, too. This was the vehicle. That's it.

Now, to implement that vehicle, that is to say, we're now going to have a superpreemptory provision, it has to read out that way. But, we now have to marry it to 524G and a trust, matters that the CE Court didn't really take up, specifically. Well, what's the interplay between? If we follow the lesson of CE and we have this clause and yet we're going to have a trust with a 524G channeling injunction, guess what? We're going to need to have this language, but we're then going to need to have carve outs. This is not -- the carve outs are not kind of oh, well, gee, the debtor or the plan proponents' predilections for creating more problems and more complexity for coverage courts. It is necessitated by the idea of having a trust with a 524G channeling injunction and the trust then holding these insurance assets so that they can be deployed because they're enormously valuable in this case. So, that's what produced the carve outs, is the necessity of having a broad language of the superpreemptory provision and yet the ability to have insurance go to the trust.

Now, the carriers may say, well, that's your problem, maybe you shouldn't have the insurance and the trust and they don't like the idea of having a trust. They don't like the idea of not being involved in the formulation of how the trust is going to operate. They don't like the idea of the insurance being in the hands of the trust and we understand that. But, the fact of the matter is, that this is a critical, critical step in the implementation of this plan. It's not simply a preference to say necessity is essential to the deal.

So, in light of that, we have to acknowledge that by gosh, the plan is not going to be neutral with respect to those carved out matters and Your Honor is going to have to determine on the merits whether they are permissible. This is all necessity. This is not optionality.

Now, the first set of issues that the carriers raise are issues of clarity. As we do this, it's certainly important to be clear. And there was a concern raised that there might be misconstruction of these carve outs and that is a totally fair criticism. And to the extent that we have issues about clarity, there's no question and there's no issue of the fact that we've got to be clear and Your Honor has told us areas where more clarity can be obtained and Mr. Lockwood, Ms. Esayian and Mr. Guy I'm sure will work on clarity. That's just not an issue. In fact, you might even think about, I have no authority for saying this, but what if you made the

superpreemptory provision in all bold caps so everybody knows that's the magical language, that's the important stuff, that's what you go to first like a disclaimer of warranty is a buyer beware. This is not going to trump anything, coverage judge beware.

But, there are other issues that are being put out on the table that go beyond clarity. And the other issues that are raised are issues about getting more substantively, the more. And the necessity of getting more has been attached to the argument that Mr. Lockwood addressed, and that was reiterated again and again, which is the concern over getting comfort that as this goes forward in the coverage process, it's all going to be understood and it's going to be given effect, whatever the Court -- whoever the Court might be.

It's kind of wouldn't you want, Your Honor, wouldn't you want if you were us to have this provision and, well, if it doesn't really change anything and you intend to do it, why don't you just say it? It's the idea that it has to be -- there has to be a certain amount of advocacy built into this so that what is substantively intended here is, in fact, given effect before a coverage court.

And the difficulty with that is that it doesn't listen to the lesson of CE. CE said that the solution to this problem is the substantive provision called the superpreemptory provision. That is the vehicle. The CE Court didn't say, oh,

well, gee, we now have to have some more umph developed into it by adding on substantive provisions such that there's a sufficient momentum behind the superpreemptory provision that even some poor coverage judge will get it. That's not what the CE Court said. That's not the benchmark. That is not the standard.

The communication that they said was appropriate was the superpreemptory provision. And, therefore, everything that is added onto the superpreemptory provision is essentially a -- and beyond that in the carve outs is essentially an engraftment that is not what the Third Circuit chose. They're trying to expand the ambit of what the Third Circuit has said is a viable concept which is neutrality by saying the neutrality must be communicated, and must be developed through an enhanced vehicle.

And there's no -- there's nothing about this case that's different from CE in terms of a need for that kind of enhancement. There's nothing that's been said that oh well, coverage situation is different or neutrality really has to be different, and what CE held in the Third Circuit has now got to be different by virtue of new facts that are out there. There are no new facts that are out there that says that somehow the language itself is insufficient and ineffective. That's point one.

Point two, inevitably you have to ask the question of

what is the job of this Court and what is the problem with -- the supposed problem with these coverage courts? There's only one alternative to putting this off to coverage litigation which everybody seems to want to do and that is to have the litigation here which nobody seems to want to do. So, if the litigation is going to be not in this court, it's going to be in the court of the trust's choosing and that may be a state court in the jurisdiction that the insurers don't like, or it may be that the insurers get there first and they file their coverage case in a court of their choosing at which point you've got to believe that somehow they would pick a court of their choosing where they thought that the coverage judge was going to get it and was going to understand the language of the superpreemptory provision.

But if, in fact, the trust strikes first and they pick an unfavorable jurisdiction, you know what, the fact that the forum may not be favorable is not a problem of this bankruptcy case, this court and of the Third Circuit and the language that they endorsed. That is a problem, if it is a problem, of jurisdiction, of courts to hear coverage disputes. So, when the carriers say they don't want to litigate it here, they're making the choice to say, they want to litigate it someplace else and when they make that choice, they're subject to the risk that they'll have a judge who doesn't really care or a jurisdiction that is unsympathetic.

That is not this Court's problem. We don't have to sit there and develop a plan that is, I'll say it with all due respect to whoever it is that the carriers chooses, the judge, idiot proof. It has to be a plan that tracks the language of CE. That is the basic problem. And so you get to the question of, what's this Court's job? This Court's job is to follow CE. This Court's job is not to solve the basic problem of what's going to happen in the coverage court.

Number three. You have to ask the question, well, with whatever you add, if you wanted to reach out and kind of assist the communication process, you have to ask the question are you adding something that is worth the problems that might be created by virtue of what you're adding? That is, every time you add a new provision, you don't necessarily -- it's not necessarily an all-benefit process. You then have to reconcile that provision with a lot of different things. For example, you have to reconcile that position with the truth. And Your Honor pointed out yesterday the fact that you can't say that this case and this proceeding will have no impact on a coverage proceeding.

It might, to the extent that this case is the dispositive determination of issues that are accorded solely to the jurisdiction of this Court. It is going to have some kind of impact. So, you can't say it's not going to have any kind of impact. And that's illustrative of the problem which is, as

Mr. Lockwood and Ms. Esayian and Mr. Guy go through the more provisions, not just the clarities, but the more provisions, each one creates its own little world of problems and that's why it's so tedious to hear anybody go through them is that they are each one kind of a little set of problems and no matter which provisions are, they are a little set of problems.

And that inevitably then gets to the next point which is that as soon as you start to say, I want comfort for what happens down the road, or Mr. Brown says consider the audience, you are immediately speculating about who's the audience, in what context on what issue. There is no one audience. You can't sit there and tailor this to an audience unless what you were trying to do is to say, we'll assume that the audience is stupid, hostile, uninterested, lazy and again you get back to the proposition that you got to make this thing so rudimentary and hit them over the head or say you got no choice. Well, that is a rank speculation. We can all speculate about who the audience will be and what the context will be. And speculation should not drive this process. The benchmark is not speculation about what might happen in a coverage court. The benchmark is what CE told us was the right language.

And the final problem with the mores, you got, (a) is it true, (b) do you have to speculate, and (c) you start to get something else coming in the process which I'll call creeping coverage controversy, CCC, creeping coverage controversy. And

we've had that already which is that kind of be careful you ask too much. We're now speculating that there's a coverage judge who's out there of one stripe or another. And we're speculating that they're not going to get this or they're not going to get that and will be hostile to it. So, the solution in the more provisions is to hit them over the head and say here, we anticipated that you might be enticed to do this bad and awful thing, so we're going to tell you not to do it. Don't do this.

And the difficulty with that is that it starts to be, in a sense, a process of injecting us and this Court into telling the coverage judge what the potential coverage issue is. For example, Mr. Brown said you know, if you take a look at that order, it's not really true that rights are being preserved. That's not really accurate and maybe you ought to scratch that from the order.

Let's just see how that would work. If Your Honor had that order read out, that it's not just -- it's not rights and defenses. It's just defenses. Then Mr. Brown's colleague who goes down to Texas or whatever to argue coverage, says, uh, that was stricken and the reason it was stricken is that it's very apparent that the rights have not been preserved, that this is all a question of defenses and remedies, that really the TDP itself was already a breach. That's essentially what Mr. Brown argued, that the TDP itself already is a breach. And

so now he'll say oh well, you know, we flagged this issue and really the TDP itself already is a breach, Mr. Coverage Judge, aAnd that's already been decided and -- but we have a complete remedy.

Well, at that point, Your Honor is being characterized as having walked down the road and already flagged the problem that there is a breach in the TDP itself. And there's almost an invitation. And Mr. Presse's (phonetic) affidavit does the same thing. The whole idea that the TDP can't be consistent with coverage the way that it was negotiated, the way that it's styled, what it says, can't be consistent with coverage rights and we know it today.

That whole notion is an argument. It's a coverage argument. So, the idea that we have to have more provisions to guard against the possibility of misapprehensions and misconduct by the coverage judge gets this Court pretty closely into the coverage litigation itself, to the point that there are repeated protestations, oh, Your Honor, we're not asking you to decide coverage. Well, but they're asking you to anticipate the coverage litigation and start to involve yourself in their process of telling the coverage judge that this is what happened or what didn't happen.

And this really comes back to fundamentally the same proposition. The fix, the fix to the problem that the CE court chose knowing all about, as Mr. Lockwood indicated, the fact

that there are going to be coverage cases down the road, the fix is this, it's this language. It is not these additional provisions that are the cold comfort provisions that are designed to get the Court and this process and inferentially the Circuit involved in trying to figure out what is sufficiently clear and what is sufficiently protective of the coverage issue for a subsequent court. The CE Court already resolved that issue, and it's not any of those provisions.

Now, in the service of getting things done maybe we can see if we can reach agreement, and we'll try. And I'm not suggesting that there's any limitation from a negotiation point of view on whether we can reach agreement. But, if we can't reach agreement, these arguments are per se under the Third Circuit's decision out of line. They used the wrong benchmark. And then we get finally to standing. Why are we doing all of this in the context of standing? We want the neutrality. That's important under any set of circumstances. But, we also want the standing determination. Why is that important?

It's important because, and I've changed this chart, and I've given copies of it in advance to all the carriers. I changed the chart a little in two ways. One is to underscore that the carve outs or exceptions all fall within the same subject matter ambit which is the preservation of coverage rights and defenses. We have the neutrality provision itself

and the exceptions that are exceptions to the neutrality provision, but they relate to the same subject matter which is preservation of -- they relate to the coverage, the provision of insurance. If there is no standing here, the real effect of this is not that we'll necessarily have all of a sudden a completely different cast of characters, we'll be down to Mr. Millner -- no, it will be Mr. Brown or some pure coverage player. I promised myself I wasn't going to mention it because I still want that chart up there at the end of the day.

But, it's not that we're going to necessarily have, you know, a whole bunch of insurers disappearing. It is that with respect to each insurer that comes in for Phase II there's a threshold question which is, what is their standing? And to establish their standing in Phase II it will no longer be anything to do with providing insurance. It will be, do they have a claim? Do they have a real claim, as opposed to a speculative claim or an abstract idea that they may have a claim? Do they actually have a claim? And that is -- because it's only those people that will then have standing to raise these other questions. So, the real benefit of the standing determination in connection with neutrality is that it creates now a clear litmus test for participation in Phase II which is them to come in, as Mr. Lockwood has said, and demonstrate that they really have a claim.

So my last observation about standing is, (a) it's

important, and (b) what's the test? People have said, well, CE went off on a person aggrieved standard, and that is correct. CE was person aggrieved and that is a special bankruptcy overlay to Prudential standing that deals with the appellate process, and we understand that. The point that needs to be made though is that CE person aggrieved is really an engraftment upon or an extension of the doctrine of Prudential standing. And whether or not person aggrieved is met here, and I'm not saying that it's not met here, but whether or not it's met here is not the point. In this case, Prudential standing applies, because this Court is operating in the context of an Article III system.

And because Prudential's standing applies, we go back to cases like Quigley that decided at the trial court level saying, wait a minute, bankruptcy is one thing, but we're here in the federal system, Prudential's standing applies. Prudential's standing applies right here. Interested party or party in interest under the bankruptcy code does not trump the Prudential standing requirement. Whether or not they are parties in interest in this case does not address the issue of Prudential's standing which is their ability not only to participate in the case, as parties in interest, if they are parties in interest, but to strike out at other provisions in the plan that don't satisfy the requirements for Prudential standing. That don't sufficiently pertain to them in a direct

enough way that warrants their standing up and dealing with all these problems even at the trial court level.

So, standing should be decided on the basis of not party in interest, party in interest does not trump Prudential standing. It should be decided on the basis of the Prudential standing requirements. And on that basis we believe that once there is agreement or a court order regarding neutrality, each and every insurer that comes in for the second round has got to stand up and demonstrate to us what is their claim that does not relate to coverage and is it sufficiently real to give them standing to address these other provisions of the plan? Thank you, Your Honor.

THE COURT: All right. Okay. Mr. Millner, I'll hear you, then we're going to take a few minute recess.

MR. MILLNER: Just on the issue of cum onere. It's not comfort that we seek, and it's --the problem is this. Mr. Lockwood's proposition is that the assignment of a contract, the assignment of the rights, the assignment of the contract takes with it necessarily the obligations, and therefore my saying that the plan should be express on that is merely asking for comfort. Quite to the contrary. The plan does not purport to assign insurance contracts. It purports to assign only certain rights,
asbestos-related rights to a trust. And because of that the transfer of the obligations that go with it does have to be

express. Precise --

THE COURT: But, that's what I was asking about yesterday because I'm not certain that that's really what the insurers want. Maybe your client wants that, I don't know. But, to the extent that the debtor has certain access to information and the duty to cooperate and so forth in most, if not all, of the other cases, those obligations have remained with the debtor. Now, how the debtor carries that out is a different issue. But, that obligation has not been transferred.

MR. MILLNER: The only duty I've seen remain with the debtor in any of these cases, and it's been expressed in some of them, has been the duty to cooperate. The duties to pay retrospective premiums, for example, have gone with the trust.

THE COURT: To the trust.

MR. MILLNER: And the other duties to --

THE COURT: Oh. So, you're saying this plan doesn't provide for even the monetary -- whatever the -- if there are retrospective premiums, none of that obligation follows the trust.

MR. MILLNER: I'm not sure. I don't think so. I don't think it's express. We could check that. Clearly, the obligations pertaining to my contract which say it's an obligation not to tender asbestos related claims, that is an obligation that this plan is silent on. The point of these

charts, one of the points is that the neutrality language has to be married to the plan. If the plan itself is defective in some regard, then the neutrality language won't work. What I'm saying is the plan is defective in this regard. The plan has to spell this out expressly.

We may ultimately disagree, perhaps a duty of defense could be -- stay with the debtor, although that I've only seen in actual stipulations like Mogul. But, the plan at least should be express. This has implications beyond the neutrality, Your Honor, as I was trying to say yesterday, because at least in my case if the obligation not to tender claims doesn't go to that trust, if the Court permits assignment, which it's done in every other case -- so I'm thinking where we'll go here -- then my client is prejudiced by saying it can't urge as a defense against that trust that it's breaching, that contract where the rights were assigned.

And number two, when we get to Phase II by that legerdemain they will have cutoff my setoff right because the entity breaching the contract would say, well, normally you would have a right of setoff, your damage is against whatever I'm claiming. But, here I've somehow split the obligations from the rights. So, this is a substantive point, and whether you agree or disagree with anything else I've said, Mr. Lockwood's cum onere argument doesn't solve it. That's my remark.

THE COURT: Okay.

MR. BERNICK: For Your Honor's information I'm told that there are no retrospective premiums that remain for asbestos personal injury claims.

THE COURT: All right. Okay, let's take a ten minute recess, and then we'll reconvene. Thank you.

(Recess)

THE COURT: Anybody have any additional arguments that you want to raise before we start to evidentiary submissions?

MR. GIANNOTTO: Your Honor, Michael Giannotto for Continental Casualty and Continental Insurance. Just very, very briefly.

I just want to comment upon some of the statements made by Mr. Bernick about the standing issues. I think maybe he inadvertently misspoke. He said in Phase II the insurers -- the only way the insurers would have standing is if they could show that they had a claim under some of these clauses. I think what he likely meant, and I think what his paper says is, basically, if we were harmed by a specific provision, you know, one of these exculpation, or injunction provisions or the other provisions he points to, the key understanding is whether we're harmed, not whether we have a claim under them.

And the second point is only, Mr. Bernick mentioned, as he had yesterday, that, you know, in his view we would have

to establish what he calls these Prudential standing requirements, issue-by-issue, not asserting someone else's rights, that sort of stuff. And you had said, Your Honor, yesterday to me when I was standing here that you believe that was the law in this Circuit. Respectfully, I don't -- I know some bankruptcy courts have applied those standards and other bankruptcy courts have not, and I don't believe it's the law in this Circuit. And I don't want to argue that here, but what I understood when we spoke yesterday is that we'll have a chance to argue our standing in our briefs.

THE COURT: Yes.

MR. GIANNOTTO: And what we just don't want you to do is prejudge that by ruling here that all those Prudential things apply, because we'll be briefing that we don't think they do, and we can join issue on that.

THE COURT: I haven't made any rulings. What I think I said is, I think that's the law in the Circuit. So, if you think I'm wrong show me why.

MR. GIANNOTTO: Okay. Thank you, Your Honor. That's all I have.

THE COURT: That's the purpose of the briefing.

MR. GIANNOTTO: That's all I have, Your Honor.

THE COURT: Okay.

MR. BROWN: Your Honor, Michael Brown for Geico, Seaton and Republic. I truly will be brief.

Mr. Bernick said in his presentation that, “Each provision creates a world of problems.” And I think to some extent he’s right about that. And one of the provisions that’s creating a world of problems for the insurers is -- appears in the definition of asbestos insured coverage defenses. It’s the Romanette (i) that says, “The plan or any plan documents do not comply with the bankruptcy code.” It sounds innocuous, but it does create a world of problems, at least possibly, and that’s a problem that needs to be solved.

The second thing I wanted to point out was, there was an awful lot of talk about the unknown coverage judge that’s going to have to deal with this. I don’t want there to be any suggestion on our part, if indeed it was certainly on the part of the plan proponents, that this person is going to not want to do the right thing and isn’t going to understand the provision. The point here is simply this, we’ve spent the last day and a half dealing with essentially 7.15, a page and a half. And the coverage judge should not be subjected to that. It should be clear, and it can be made clear, and that’s what should happen. Thank you.

THE COURT: Anyone else? Mr. Bernick.

MR. BERNICK: Whatever Your Honor obviously wants to do next, we’ll do. But, I thought that it might be appropriate if we’re done with arguments and we get through perhaps the less exciting process of going through documents, and I’m

assuming -- I believe that there is discussion underway about how to make that more efficient or as efficient as it can be. We should probably return to the question of the schedule so that we have clarity on what it is that we're supposed to be doing and when we're supposed to be doing it. And I think that we discussed that preliminarily yesterday.

I don't know that anything in particular has changed from where we were yesterday, but I think that we should find out whether people have views that are different from what Your Honor articulated. And then I think that it would be important to do a couple of things. One is, on the Phase II hearing -- pretrial hearing, we would want to do that on the 27th. If we're going to do that on the 27th, Your Honor should probably impose some requirements this time around for how we're going to do it the old-fashioned way and in a way therefore that leads to fewer misunderstandings about what the pretrial conference is going to involve.

And then finally, we did make a request through Ms. Baker that we talk about whether there might be some additional Phase II hearing dates as closely as possible. That's not by way of, you know, -- of course, if you create the field of dreams people will come. If there's more time people will tend to use it. But, at least it avoids the opposite problem which is that we run out of time. We just don't have enough time to get things done. So, I don't know if Your Honor's had the

chance to look through the calendar.

THE COURT: I was just looking at my calendar. I asked Ms. Baker to ask Mr. O'Neill whether the Flintkote trial was -- plan confirmation was actually going forward because, it was three or four days right after Grace was to finish. And she just handed me a note that said that the new plan was just filed. I haven't seen it, so I guess it is going forward then? Is it going to be ready by then?

MR. O'NEILL: I believe so, Your Honor. I can confirm that and report back also if there's any change in schedule, et cetera.

THE COURT: Okay. That would be helpful, because it may be easier to figure out how to keep Grace going for that two weeks in a row, and to put Flintkote somewhere else. But, I guess the other question is, is Flintkote going to need that whole time, four days?

MR. LOCKWOOD: Well, Your Honor, Mr. Bernick is one of the principal objectors.

THE COURT: Yes, I know.

MR. BERNICK: I'll be happy to do that after I've read the new plan. If it's like the old plan, there's going to be more to be said about that. But, I know we have a -- the omnibus is going to focus on Flintkote on the -- what's the --

THE COURT: On Monday.

MR. BERNICK: On Monday, right. So --

THE COURT: So that may -- depending on whether Flintkote's actually ready to go back to confirmation at that time -- or to confirmation at that time, that may affect this schedule.

MR. BERNICK: Why don't we leave it that we'll see what happens with Flintkote? But, the request is kind of a standing request. I don't know that we need to know immediately, but that is something that I think would be important to do to give us some flexibility.

THE COURT: All right. Well, the Flintkote dates in the event that that does get freed up, so everyone can check, are the 14th through the -- let me double check whether the 17th is included. I've forgotten.

It's the 14th through the 17th of September, and then Grace was to take place the following week -- I'm sorry, the week before. I apologize. The week before. So, this -- basically that would just continue this trial.

MR. BERNICK: Well, we'll see what we can do in connection with the Flintkote case to assure that that result occurs. I'm just being facetious.

THE COURT: All right. And then after that the dates --

MR. LOCKWOOD: If he withdraws objection, Your Honor, it would shorten things (indiscernible).

THE COURT: The next two dates that I have in a row

that are clear are October 13th and 14th. Keeping in mind that I know you folks don't like traveling on holidays, the 12th is Monday and it is a holiday. It's Columbus Day. It's a court holiday, apparently. I don't know that -- at least in this area schools and things are not out. But, that might not be the case everywhere. So, I would have the 13th and 14th as two days in a row. That's as far as I got.

MR. BERNICK: Okay. Well, maybe the most promising thing, obviously, would be Flintkote, because that would just make it all nice and continuous.

THE COURT: And if you can resolve it so that Flintkote only needs two days, then that might be --

MR. BERNICK: I'm kind of surprised if in any event Flintkote would need more than two days.

THE COURT: Well, you folks can talk about that perhaps at lunch and see, and Mr. O'Neill can double check, too, and maybe after lunch we can address that issue. But, that's what I know I have available right now.

MR. BERNICK: Okay. So, I guess that leaves us first of all to find out whether the carriers have any further feelings with respect to the dates that were posed yesterday for further proceedings, and then maybe on the matters leading up to the pretrial conference, is there something that we can just look to that sets out what Your Honor generally requires for the pretrial and --

THE COURT: Yes. I'll just tell you what it is that I think I would like. What I really want to know is the statement of issues at this point. I guess a list of the witnesses that you would call in support of those issues. And normally I would ask for your documents to be pre-marked for identification, but that's a little bit in advance of when the trial will actually take place. I don't need them that soon. So, what I need from you is dates by which all of that information can be submitted. I would like to have at least a statement of issues in preparation for the pretrial so I can make sure we're on the same planet.

MR. BERNICK: Well, what if we had a list of issues, but then also a list of witnesses with a brief description of exactly what they're going to address?

THE COURT: Yes.

MR. BERNICK: Whether the witnesses are appearing live or by way of deposition.

THE COURT: Actually that would be helpful, too, because that might assess how much time would actually be needed for the Phase II hearing, and to the extent that you need additional days that may work. I guess the question for me is, is discovery finished on the Phase II? I don't know.

MR. BERNICK: No. There's still some discovery outstanding, but it's really quite limited. In terms of depositions I think there are a couple more depositions that

are out there, but I think most of them are done. That's to set aside the solvency thing which is on its own little track. It also sets aside feasibility which is an issue that's out there. I think that that's going to be pretty straightforward at the end of the day. But, there will be some -- something will have to take place on feasibility. But, on the general question of how far progress has been made in service of getting ready I think a huge amount of the work for Phase II has been done and there's really comparatively -- I don't think that we're anywhere near off track. If anything, we're more ahead of the game than at least I expected that we would be at this point in time. That's just my own observation.

THE COURT: Okay. Well, I guess the question is, let's say a week in advance of the hearing which you're saying July 27 is the day you want. So the 20th would be the day. I guess that's when I would like the pretrial statements filed that will identify the issues, a witness and a brief description. And to the extent you know it, I would like the documents identified, even though not attached, especially, you know, insurance policies. What I may ask you to do if that's going to be a large portion of the exhibits is just to submit them on a disk, if that's possible, with perhaps one representative policy that has to be submitted on paper. And those policies you may already be putting in the record today, I don't know. You folks can let me know whether that will

work. But, I don't think I need gazillions of trees cut if the policies are all going to have to be in.

MR. BERNICK: The other thing that I would -- you know, inevitably the pretrial conferences, because when people have to do these kinds of things of course then they err on the side of over inclusion so as not to be caught short. And inevitably what that means is that everybody then does a huge amount of work unnecessarily. It seems to me that maybe if we could get some indication from the Court that these should be real lists; that is, people that we believe we will, in fact, call and with a high degree of confidence. And then -- but to have in the pretrial order a provision that says, you know, people can amend their -- at least their exhibit lists, and on cause can amend their witness lists and, you know, cause will be reasonably granted. So, that people can supplement. I'd rather have supplementation than have a real list to begin with than to have these completely unrealistic lists --

THE COURT: Well, at the pretrial if you're not realistic in the pretrial statements you'll have to be realistic at the pretrial conference, because you're going to tell me, essentially, at the pretrial, if not before, who you're calling so that we can figure out the timing that's needed for this trial.

So, yes, a real list is -- you know, you can reserve the right to call everybody on everybody else's list.

Everybody always does that anyway. But, tell me who you intend to call. That's what I would like to know.

MR. BERNICK: Right. Okay. I think --

THE COURT: And whether it's live of by deposition would be helpful, as well.

MR. GIANNOTTO: Your Honor, just a brief point. Obviously, we'll comply with your deadlines. One of the -- just because of the scheduling in the case management order that presents a little bit of a glitch to this is that while the objectors' trial briefs are due by July 13th and so then the pretrial could be the 27th, the plan proponents' trial brief is not due until August 7th. And one of the things that we found from the exchange of trial briefs on Phase I were that a lot of the things we thought were issues really weren't issues once we got their trial brief. And who we might call as a witness may depend upon what position they take because we filed objections, and they haven't really had to respond to those objections yet.

We'll file a trial brief. They will not have to have filed a rebuttal trial brief by then. And so, you know, we'll try to do the best we can, but since we don't exactly know what issues are really going to be joined until we see their trial brief, you know, we may have to amend things or we may have -- because we're just not sure what they're going to do at that point. I mean, if you could postpone the pretrial until after

their trial brief that would solve that problem, but that may screw up everyone's schedule.

THE COURT: When are the trial briefs due, I'm sorry?

MR. GIANNOTTO: The trial briefs for our side, the objectors, are due the 13th of July. The trial briefs for the plan proponents are due August 7.

MR. BERNICK: Well, that recognizes the reality of what's involved in responding. How many different briefs do we get?

MR. GIANNOTTO: No, no. I'm not criticizing the time period. I mean, that's legit. I'm just saying that it hampers us in our ability to list witnesses and to really -- you know, we hear you from today, Judge, and yesterday. You don't want some -- we're going to like challenge everything in the world and here's every witness that's ever named on a document. We want to make this a meaningful pretrial because that benefits both sides, and it obviously is useful to the Court. But, if we have their trial brief ahead of time, that makes it easier to do that. It makes it so we don't have to do overkill because we don't know what they're going to take issue with.

MR. BERNICK: Are you suggesting --

COURT CLERK: Could you turn on your microphone, please?

MR. GIANNOTTO: Yeah, I mean, if that's possible. I don't know --

MR. BERNICK: In which case we would -- I mean, what we don't want to do is do the same thing with the lenders and with Libby. So, we'd be talking about two different Phase II pretrial conferences; one on the 27th for the other folks, and then the insurers later on. If that's okay with the Court I'd -- that's probably all right with us if we can get the right date.

THE COURT: Well, the next omnibus hearing for this case after August 7 is August 24.

MR. BERNICK: Yeah. That's way too late.

THE COURT: Well, the only other date at the moment that I have is August 18. I could do it then. I mean, they're going to need some time to react and to amend whatever it is that the debtor has done. That's only ten days after the debtors' brief is due. So if I gave them --

MR. BERNICK: Your Honor, if the only concern is their ability to specify what they intend to do based upon their objections and that they might have to be overly broad that way, I don't think that we should have the -- if we could do it like on the 3rd or, you know, whatever it is --

THE COURT: But, your brief isn't due until the 7th.

MR. BERNICK: Oh, well, then they -- well, maybe it's just not realistic then, I guess, is what I'm really saying. Because if they're going to need to have more flexibility built in to the pretrial so be it. But, the trial briefs are really

important and the pretrial process is something that is important so that we can start to get real. And if it ends up that they call fewer people as a result of our brief I frankly don't think it's going to be all that shocking. So I would prefer to stick with the 27th than to have a pretrial that gets that close to the trial.

MR. GIANNOTTO: Your Honor, I mean, it was a shock their briefs in Phase I that they -- I think they agreed with us on a lot. I think it would be more useful to have narrow issues and stuff. We'll do what you want to do. But, I think it would be useful to have the pretrial after their brief. If the schedule doesn't permit it, the schedule doesn't permit it, and we'll do whatever we have to do.

THE COURT: Well, I just think if you're getting their briefs on the 7th you need some time to react to it. I need some time to take a look at -- you're going to have to file supplements if you want the supplements. So, if I give you until, you know, the 13th or something to file supplements and we did an amended or a supplemental pretrial on the 18th I really don't see how it's going to get done any faster than that.

MR. GIANOTTO: That's fine with us. But, if there's a problem with the Court or with the plan proponents, you know, -- that would be fine with us to have the pretrial. I just want to understand what you're saying. You'd have a pretrial

on the 27th for the other parties and a pretrial on the 18th for us, or would we be at both?

THE COURT: Well, I think what may make sense perhaps is to do the whole pretrial on the 27th anyway and find out whether just on the basis of the briefs that the insurers have submitted that won't limit the issues. But, what I'll impose is a requirement that you actually get together and talk with the other side in advance. I understand that they don't want to submit their rebuttal brief in a hurry because that may take some thought, and I agree. That may end up eliminating some issues. But, to the extent that it won't hurt, I think, so that we can at least get some basic idea of who the witnesses are that the insurers intend to call, and how much time I really do need to set aside.

I think a pretrial on the 27th is a good idea. If we need a supplemental one, then I think we could do it on the 18th. Whether we'll need it or not I don't know, but we could reserve the time if we do. It seems to me if we do the pretrial on the 27th then the debtors' brief is submitted on the 7th and I give the insurers, you know, until the 13th to amend, I guess would be the word, supplement, let's say supplement, your submissions if the debtor has any problem with the supplementation then the 18th would be the day to talk about it.

MR. BERNICK: It's supplementation. As I understood

it, and I don't -- you mean supplement in the sense of further refining.

THE COURT: Change.

MR. BERNICK: Yeah.

THE COURT: Right.

MR. BERNICK: But, because the other advantage of the pretrial conference is if there is some discovery that slipped between the cracks, people have a witness they intend to call who's never been deposed, we can then have some time to deal with that.

THE COURT: Right. And that would give you until -- everybody, that is, until the 18th of August to get that finished, in essence, because that would be the, we'll call it final pretrial. So, I think it might still be helpful to go through the exercise on the 27th. I don't want to add expenses that are not necessary. I just think having gone through the last two days that maybe this is really a necessary expense.

MR. GIANNOTTO: I think from all of our point of views I think it's necessary, Your Honor. Thank you very much.

THE COURT: All right. So, then we'll do a pretrial on all Phase II issues, and for all Phase II participants on July 27. That's -- I'm not sure where that is. One second.

MS. BAER: It's Delaware.

THE COURT: In Delaware? Okay. And a final pretrial on August the 18th here in Pittsburgh. And let me find a time

for that. Just a second.

MR. BERNICK: This will be insurance?

THE COURT: Yes. The insurance issues.

MR. BERNICK: And can we make it, you know, if necessary?

THE COURT: Yes. And how will I know if it's necessary?

MR. BERNICK: I guess we'll have to make sure that you learn, and promptly. I mean, it seems to me that if we submit our briefs on the 7th that maybe we can have a conversation with -- we'll have a meet and confer call. Pick a day like the 12th of August to see -- to get a sense from the carriers whether they believe it's necessary and that way Your Honor doesn't have to do -- you know, Your Honor doesn't have to maintain time that really proves to be unnecessary.

THE COURT: All right. Then I would say that their modified pretrial submissions should be due by August 13th. That would only give you Friday the 14th and Monday the 17th to do a meet and confer. Pick one.

MR. BERNICK: We'll do it the 15th -- I'm sorry, the 14th.

THE COURT: The 14th is Friday. That would be the day after you get their amended submissions. So, I don't know if you want until the 17th which is Monday.

MR. BERNICK: I was only thinking about Your Honor's

convenience. That would be better for us, certainly.

THE COURT: The 17th is fine, because frankly I think if there's a need to do a supplemental I'm not sure why it can't be done by phone.

MR. BERNICK: Yeah. Okay.

THE COURT: So the parties are to meet and confer on August 17th. Pick a time.

MR. BERNICK: Two o'clock in the -- ten o'clock in the morning. Make it ten o'clock.

THE COURT: 10:00 a.m. eastern?

MR. BERNICK: Yes.

THE COURT: All right. And then I guess I'll just rely on Ms. Baer or Mr. O'Neill or somebody to contact my office and tell me later that day whether we will in fact be doing a hearing on the 18th.

MR. BERNICK: Right.

THE COURT: But now, if we do it by phone does anybody disagree that it could be done by phone? All right. It will only be by Court Call then. So make sure you call Court Call and sign up in enough time, in advance that you're registered so that if the hearing does go through for this one, my office must have had 25 calls about people who hadn't signed up. Please, don't do that. I'm going to say no to everybody. You've got lots of warning. Sign up now if you need to. Okay. What time is convenient? It really -- at the moment my day is

free. So --

MR. BERNICK: I would prefer to have it in the morning, Your Honor. I have a deposition in San Francisco on the 19th and 20th and I want to travel to it. So if it's at all possible I'd like to have it in the morning.

THE COURT: Nine eastern?

MR. BERNICK: Or ten.

THE COURT: Ten eastern? Okay.

MR. BERNICK: Nobody starts working in New York until ten o'clock.

THE COURT: All right. Is there anything else then about the Phase II pretrial?

MS. BAER: Your Honor, the original date that of July 20th we don't need.

THE COURT: Okay. Well, you don't need it for Phase II.

MS. BAER: We don't need it for Phase II pretrial.

THE COURT: Okay.

MS. BAER: We do have something already on the 21st which is the followup.

THE COURT: Is there anybody who needs the 20th of July for any reason in your contemplation at the moment? All right, I'm going to cancel the July 20 hearing then.

MR. PASQUALE: It's not on the 27th, Your Honor? The time.

THE COURT: Oh, on the 27th. I'm sorry. Your normal -- I think that's an omnibus date, Mr. Pasquale. So it'd be --

MR. PASQUALE: Well, that's the omnibus date.

THE COURT: Yes. Whatever your normal time is.

MS. BAER: It's 10:30.

THE COURT: 10:30. Thank you. All right, will the debtor -- do I need to go over the dates? Can the debtor submit an order that will put this on the record?

MS. BAER: Your Honor, we thought -- we talked about a lot of different dates on different things. Perhaps we should do one order that kind of sets out all the different resulting new hearings and dates as a result of this Phase I hearing.

THE COURT: All right. Do you need me to repeat what I have or are you okay?

MS. BAER: I think I've got it. We can go over it. Sure.

MR. BERNICK: Well, if it's right there in front of you.

THE COURT: All right. Well, I'm starting with the date the plan proponents' rebuttal brief is due which is August 27th. Despite that fact we will do a pretrial conference on July 27 at 10:30 in Delaware. We will have a final pretrial on August 18th. I'll be here in Pittsburgh, but it will be by phone, if necessary, at 10:00 a.m. eastern time. The insurers'

modifications, if any, to their pretrial submissions are due by August 13. The parties have a meet and confer scheduled on August 17th at 10 a.m. eastern, following which the debtor will contact my office to let me know whether the hearing is actually going forward the following day. That's what I have.

All right, now, what about the schedule for Phase I continuation. I guess maybe we need the evidentiary submissions first or --

MR. BERNICK: The evidentiary -- I think that all -- I think where we left it was that evidentiary submissions and then the briefs would simply pick up. Well, the evidentiary submissions today, then there are the Grace evidentiary submissions, if any, by way of counters and objections. And that was July 2nd.

THE COURT: All right. I thought the insurers were going to confer and see whether the schedule I outlined yesterday was --

MR. BERNICK: Oh. Yeah.

THE COURT: -- okay. You want to repeat the dates if you have --

MR. BERNICK: Well, I don't -- well, I'll just be echoing what Ms. Baer tells me so maybe -- or if Your Honor has them there.

THE COURT: Well, I can get them. I don't have them at the moment.

MR. BERNICK: We have them.

THE COURT: Oh, Ms. Baer has them. Okay.

MS. BAER: Your Honor, on the evidence, the DIP designations and counter designations are due by July 2nd, and they will be consecutive -- not consecutive, there will be post-trial submissions by both parties at the same time on insurance neutrality on July 16th and limited to 30 pages per side. And a followup hearing, if needed on those matters, is July 21st at 9 a.m.

MR. BERNICK: Although it's not expected that that is argument based upon the evidence. The argument essentially would be today and in the briefs. So that is as I, at least understood it, the 21st is a maybe depending upon whether it's necessary.

THE COURT: Right. My concern is I don't know whether I can make rulings on the objections if there are any objections. If there aren't any objections I'm not sure I'll need it. But if there are objections I may need to find out what the context of some of those objections is. That's, I guess, what my primary concern is. It's rather odd to do the closing arguments before you have the evidence submitted.

MR. BERNICK: Insofar as the objections are concerned, we can certainly make sure that our objections are stated in a way that lays them out. I mean, again, we're -- the relevance objections are going to be probably the key ones,

and I think our relevance objections we'll figure out a way in which to state it so it doesn't simply say objection relevance. We'll have a certain number of relevance objections that will probably set out the description of what the relevance objection is so that Your Honor has a better appreciation of that. And then, you know, my feeling is that once it's in -- once the objections are in and the brief -- any supplemental briefs are written that the resolution of the objections can await Your Honor's decision on the matter that you basically tell us what -- where the objections came out, and tell us what the answer is at the same time.

THE COURT: Well, that's okay as long as I understand what the objection is in the context. But that's what I -- because I need them from the insurers with respect to any submissions the debtors may have, too. So that's my concern. I need a vehicle to make sure I can rule on the objections.

MR. BERNICK: Well, I guess maybe if the insurers can agree to do the same thing, that is, if they have objections, to be a little bit descriptive about them and whatever materials are submitted to the Court.

THE COURT: Yes. Maybe that's the thing to do, just give me a fulsome objection and lay out what it is. If it's relevance, tell me why. If it's hearsay, cite the rule that you're relying on so that I have a clue in advance. And that may eliminate the need for that hearing. I just won't know

until I see the submission. So we can do that one by phone, too, if everybody wants. There isn't going to be an evidentiary presentation. I'm fine with doing it by phone. That way no one has to make travel arrangements in the event that it's not -- it doesn't go forward. Is that agreeable to everyone?

MR. BERNICK: From our point of view it would be.

THE COURT: All right. So that will also be by phone then. And I think that was at nine o'clock, correct?

MS. BAER: Yes, Your Honor.

MR. BROWN: Your Honor, that's July 21st?

THE COURT: Yes, sir. July 21. Oh, wait, I'm sorry.

MS. BAER: July 21st.

THE COURT: I can't do -- I'm sorry. I have to see whether I can do that. That's a Delaware day, not a Pittsburgh day. I'll let you know about that after lunch. Is everyone going to be back after lunch? What I need to do is find out what my 20th calendar looks like. Oh, they're only Grace days. I'm sorry. I'm confused. Oh, I'm sorry, I'm confused. The 27th is the omnibus day. I'm misreading my calendar. I apologize. Yes, we can definitely do the 21st by phone.

MR. BERNICK: Nine o'clock or ten o'clock?

THE COURT: You want ten o'clock instead of nine? It doesn't -- that again, it's reserved for you. It doesn't matter to me.

MR. BERNICK: Ten o'clock is fine with Grace.

THE COURT: Ten? All right, it will be at 10 a.m. then eastern time. The only way I'll be able to let you know that it's not necessary, I'll have someone contact, I guess, Ms. Baer who can then do a notice if in fact the hearing's canceled. Otherwise, if you don't get a notice from the debtor then you'll know that the hearing is going to go forward. And that would be the sum and substance of the contact, just to make sure that the debtor can use the list to get in touch with everyone, because I don't have access to do that. And it won't be me anyway. It would be one of my staff members. But that would be the purpose. Anybody object to that? Okay. That's what I'm going to do then.

Okay, what else in terms of schedules?

MR. BERNICK: Nothing, I guess, other than what we're going to do this afternoon unless you all have some.

MR. BROWN: Just a question, Your Honor, for clarification. The counter designations and the objections of the plan proponents are July 2nd. I thought I heard Your Honor say that they're -- if there are objections from the insurers with respect to the counter designations. We didn't have a date for that.

THE COURT: I thought I said to put them -- you could file them the same day your brief is due --

MR. BROWN: Oh. Okay.

THE COURT: -- which I think is the 16th, correct?

MR. BROWN: Got you.

MR. BERNICK: Correct. But if you'll let us -- well, I promised yesterday or what I talked about yesterday I think still would make sense although it doesn't have to be before the briefs, is if we can give Your Honor a set of the depositions marked up with both the designations and the counters and the objections on the transcript page. Obviously the objections there will be shorter. If the carriers will -- as soon as you give us -- well, as soon as you have the objections you give them to us we can complete that document and then submit that to the Court.

THE COURT: Okay. Well, can you do objections, you know, a day or so earlier than your briefs are due?

MR. BROWN: Sure.

MR. BERNICK: As long as they come to us then we can mark up the transcript.

THE COURT: All right. How about the objections due -- you're going to get the debtors' July 2nd. How about the objections due by the 12th so that the debtor can actually file that chart with me by the 16th. Does that give the debtor enough time?

MR. BERNICK: I believe the 13th is a Monday.

THE COURT: I'm sorry. I'm looking at June. I apologize. Yes. They'd be due the 13th. Would that give the

debtor enough time to do the chart?

MR. BERNICK: Oh, absolutely. It's not going to take that much.

THE COURT: All right. So the debtors' counter designations and objections to the designations already submitted are due July 2. There are no other deposition designations being submitted after today by insurers, correct?

MR. BROWN: Yeah, just the one that you mentioned yesterday, Your Honor, that you didn't have a copy of that was filed under seal. Mr. Posner's.

THE COURT: Yes.

MR. BROWN: Just that one is the only other one that I'm aware of.

THE COURT: Okay. But that will -- the debtors -- I'm sorry.

UNIDENTIFIED ATTORNEY: Your Honor, there was one supplemental designation that we wanted to add. And I was going to add it when we proffered our evidence or designations. And that was in the Lockwood deposition we were going to add, I think it was about 17 lines.

THE COURT: Okay. That's fine. Just let the debtor know today what those designations will be so that the debtor can meet the July 2nd deadline. That's what I'm attempting to do. Okay.

UNIDENTIFIED ATTORNEY: (Inaudible).

THE COURT: Yes. What I'm asking the debtor to do is submit a binder. The reason I'm asking for these designations and objections early is on the 16th I would like to get from the debtor a binder that has everything in it so that I will get the post-trial briefs, the designations. If the insurers are handing up documents today I don't need those. If not then I'd like them in the binders identified as to who they're coming from so that I have a record that is a good paper record. I think that would be helpful, because that way I'll have everything in one spot. So the counters are due July 2nd, the post-trial brief by the insurers is due July 16, but the objections to the debtors' evidence are due July 13th, and then the hearing is still potentially July 21 at ten o'clock by phone.

MR. BROWN: Okay. And then, Your Honor, just in terms of process we have the policy stipulations and we have some miscellaneous exhibits. Do you want that to all be part of this submission that you're describing?

THE COURT: Well, I thought you were offering them today or are you --

MR. BROWN: That was the intent and I spoke to Ms. Harding earlier and, I mean, you have binders of all of our exhibits. We intend actually to cull some of those out and narrow the exhibits that we're going to submit. And it might be easier if we didn't all come back here and go through the

mechanical exercise this afternoon, but submitted them culled down as we intend to, you know, in the next day or two.

THE COURT: That would be fine as long as I get them from the debtor in one set by July 16. I won't have an opportunity to look at them before everything is submitted anyway.

MR. BROWN: Okay.

MS. HARDING: And then we'll do our objections. We'll do our objections -- if we have objections, Your Honor, we'll submit them on the 16th at the same time we do the -- with the binder?

THE COURT: With the binder. Yes.

MR. BROWN: No, we'll do our objections on the 2nd.

MS. HARDING: On the 2nd with the designations. Okay. Great.

MR. BROWN: Right.

THE COURT: Right. Oh, okay, I'm sorry. I apologize. I was getting the parties confused. Yes. Your objections are due on the 2nd because you already have their designations.

MR. BROWN: Right.

MS. HARDING: But -- well, --

THE COURT: Theirs are due the 13th.

MR. BROWN: Your Honor, the only thing I think they will be -- they have the deposition designations. I think what

they're waiting for, and actually they're not even waiting for, they probably have the policy stipulations already. If not we can obviously get them --

UNIDENTIFIED ATTORNEY: We're waiting for the cull.

MR. BROWN: Right. What they're waiting for is specific exhibits and some discovery responses. And that's it, I think.

MR. BERNICK: But my understanding is that we're going to get those as a cull, but on the -- we're going to get some description of what the proffer is. That is what it's being offered for. And the discovery responses, for example, which particular discovery responses on the miscellaneous documents, what are they for? I mean, I don't want to impose a burden, but that will certainly enable the objection process to be much more transparent to the Court. So if we object on relevance it'll be clear what the proffer is. It'll be clear what the objection is.

THE COURT: Well, I'm assuming with respect to the insurance policies that the plan proponents are objecting simply because you don't think I need to look at them, it's a matter of law.

MR. BERNICK: Right. That's not the policies. There are some miscellaneous documents, or at least there were that are not policies. And so just want to be clear on what the proffer for those is. Not the policies. And again, after the

cull I don't think we're probably talking about a huge number of documents anyhow.

THE COURT: All right.

MR. BROWN: I think that's right, Your Honor. It's not many.

THE COURT: Okay. Then all in -- any insurer want to go through the exercise today of submitting your evidence? If you do I'll receive it. Otherwise I'll have you send it to the debtor. Okay, there are some who do --

MR. BROWN: What?

THE COURT: -- want to submit the evidence today. Mr. Pasquale.

MR. PASQUALE: Thank you, Your Honor, Ken Pasquale. While we're scheduling, I just wanted to jump in before we go back to exhibits on the insurance side. Ms. Baer, I don't think we ever mentioned what we talked about yesterday. And Your Honor, I think someone misspoke. We were talking about simultaneous briefing that we did agree to on the impairment argument from yesterday. I think the date that was discussed yesterday was July 10th and I think everyone intended that that would be July 17th.

MS. BAER: But it's not simultaneous. My understanding is it was --

ATTORNEYS: It is simultaneous.

MS. BAER: Okay.

MR. PASQUALE: Simultaneous briefing on impairment and the correct date is July 17th by 4 p.m. The only change is yesterday we had talked about the 10th and I just wanted to be sure on the record.

MS. BAER: Okay. Yeah. I was looking at the other thing which is your submission on discovery.

MR. BROWN: All right, and let's be clear, let's --

THE COURT: All right, I'm confused. Let me start over again.

MR. BROWN: Okay, Your Honor. I'm sorry.

THE COURT: What I just did was to deal with the insurance neutrality. So this is a different schedule. It's going to deal with impairment.

MR. PASQUALE: Correct. This is the supplemental briefing we discussed yesterday on impairment. At the time the date that was referenced was July 10th.

THE COURT: Yes.

MR. PASQUALE: The correct date would be July 17th, a week later, simultaneous briefing by both sides.

THE COURT: Because this is continued until when?

MR. PASQUALE: This is the 27th.

THE COURT: Okay.

MR. PASQUALE: This really -- actually it's a Phase I issue. I don't know that it continued -- it's the followup from yesterday.

THE COURT: All right. So I apologize, Mr. Pasquale, it was a long day yesterday. I don't actually recall why I need a supplemental argument, but I may.

MR. PASQUALE: We went through all of the charts yesterday and there were a lot of issues that came up that had not previously been briefed.

THE COURT: Oh. All right. Now I understand. Okay. I'm still stuck on insurance neutrality. I'm sorry. Okay.

MR. PASQUALE: I know. I understand, Your Honor. So that's what I'm referencing.

THE COURT: So supplemental argument then is on July 27.

MR. PASQUALE: I don't know that we talked about supplemental argument as opposed to briefing.

MS. BAER: I don't think it was in -- right, it was just briefing.

MR. PASQUALE: We did argue yesterday.

MR. BERNICK: The only thing that is up for brief -- the only thing that is up for discussion on the 27th, as I recall, is the follow on to the solvency discussion. And it's a separate schedule. But at the conclusion I believe Your Honor directed to have supplemental briefs to deal with standing -- any further standing issues simultaneously. And I wasn't aware that the 17th versus the 10th, but --

MR. FREEDMAN: It had to do with the ipso facto

arguments.

MR. BERNICK: I understand that. I understand what it was about. The question is the date.

MS. BAER: The date is the 17th. We did not talk about --

MR. FREEDMAN: It was intended to be the 17th.

MS. BAER: -- having any further hearing.

MR. FREEDMAN: Submit the briefs.

MS. BAER: Right.

THE COURT: Okay, that's fine.

MR. BERNICK: We're in agreement.

MS. BAER: Right.

THE COURT: It'll be the -- the date is the 17th an I'm not going to schedule any additional argument. If I think it's necessary after I get through the briefs then I'll let you know.

MR. PASQUALE: That was our understanding, Your Honor. Thank you.

THE COURT: All right.

MR. PASQUALE: And just to close the issues on the committee lenders and the plan proponents, on the solvency side of things, just so we're clear, and there's no change from what we discussed yesterday, but just so we're talking scheduling all at one time, we will submit on our side, the lenders and the committee, I guess it's a statement of any additional

information or what those issues are within two weeks, and that's July 10th. The plan proponents will then submit their counter or response or whatever you want to call that two weeks after that. So July 24th. And that issue, Mr. Bernick, is correct. That was my understanding as well that we would discuss that as part of the pretrial on the 27th.

THE COURT: Okay. That's what I was trying to get to on the 27th, and that's why I was confused. Okay, thank you.

MR. PASQUALE: Thank you, Your Honor.

THE COURT: Give me one second. Okay. Mr. Lockwood.

MR. LOCKWOOD: Your Honor, one final detail. Yesterday, as I recall, you had indicated with respect to the arguments the insurers were making about the TAC and the Congoleum case that you had directed them to submit if you determined that the plan was insurance neutral, you directed them to brief the proposition of why they would have standing as unsettled insurers to argue about the TAC conflicts of interest.

THE COURT: Yes.

MR. LOCKWOOD: And I don't recall that you had ever set any kind of a schedule for that. I don't know whether you think one is needed or since it's tied to your ruling on insurance neutrality it's a little open-ended.

THE COURT: Maybe the thing to do is just set a date and get the issue -- well, no, because that may mean you've got

additional work to do. I don't know.

MR. BERNICK: Your Honor, I'd make a suggestion on that, because we do have time between the 27th of July and the final confirmation hearing. Maybe if you have some feeling about where the neutrality decision is going to come out. Why don't we just take that up as an item 4 of the pre-trial conference on the 27th. And by that time we might -- you might have a further feel for that, and we can determine what the briefing would be. There'd still be significant time. There's no real reason that that has to be decided -- standing has to be decided immediately. I'm sure we'll get wrapped up into the basic question about, you know, what their alleged conflict is.

THE COURT: All right. That makes sense, because I think that will still give you some time to negotiate this language, too. Because I'm hoping you can come to some consensus as to what the neutrality language ought to be. And I've heard your arguments, obviously I'll give you a decision if you can't come to an agreement. But it seems to me truly that you're not that far apart as to the basics. Some insurers seem to want aspects added that the debtor doesn't want to add. I say the debtor, the plan proponents don't want to add. The plan proponents seem to have a few things in that are a little troubling to the insurers. It seems to me that what's in 7.15 now could probably be tweaked to accommodate everybody's interests. I don't think it's that far off the mark. But

tweaking probably wouldn't hurt it from anybody's side. So I will give you marching orders to go tweak.

MR. BERNICK: A little detail there. At the end of the day yesterday, or I guess, beginning mid-day yesterday there were discussions amongst counsel about how those affidavits should be submitted in connection with the lender issue of impairment. As Your Honor asked what the undisputed facts were we had said we would edit the affidavits of Messrs. Shelnitz and Freedgood and submit them. I understand that they're very close, but it seems to me that they ought to be submitted. We ought to get to resolution on that fast. Probably the best way to do that is just to say that that should be done by this Friday the 26th, because there's no reason why it shouldn't be done by the 26th. And that way it'll be resolved instead of being, you know, kind of a hangover issue that we have to deal with later on.

MR. PASQUALE: Ken Pasquale. Not a problem, Your Honor. Friday is fine.

THE COURT: Okay. Then the affidavits will be due by June 26th, but that won't change the briefing schedule. The briefing schedule stays fixed. Okay. Would you like a lunch recess? How long are your submissions going to take? All right.

MR. BERNICK: Can we just maybe talk about that process a little bit? The policies -- there's going to be a

relevance issue. And I'm assuming that Your Honor's not going to resolve the relevance issue today?

THE COURT: I don't think I can.

MR. BERNICK: Right. So with respect to the policies the only issue, as I understand it, is the authentication of the policy. And Mr. Horkovich is not here today as I recall. Is Lisa?

UNIDENTIFIED ATTORNEY: She's here.

MR. HORKOVICH: I'm here, David.

MR. BERNICK: Oh, you are. So you're present virtually. So if Mr. Millner stands up and gives his usually effective arguments with respect to the authenticity of the whatever it is policy, are you going to be prepared to address that this afternoon?

MR. HORKOVICH: Yes. I think it should go flowingly. We worked it out with all the insurance companies yesterday. There was some authentication issues, Your Honor, and we have provided the insurance companies with our best copies of the policies so the insurance companies have agreed to substitute where their policies may have been lacking. And so we've reached a couple of formal stipulations in writing which could be submitted, and have agreed with the insurance companies as to what documents would be submitted in terms of the insurance policies. And as far as the insurance policies and the settlements are concerned, Your Honor, we will save our

relevance objection, but for the purposes of this Phase I hearing would waive authenticity and business record exceptions with regard to the insurance policies that --

THE COURT: Mr. Horkovich, are you on a speaker phone? You're fading out.

MR. HORKOVICH: No, Your Honor, I'm sorry, I'm not on a speaker phone. I think it's all going to work out just fine, Your Honor. With two of the insurance companies, Mr. Brown's clients and Elizabeth DeCristofaro's clients we've reached actual formal written stipulation. And those stipulations could be submitted to the Court with the policies. With the rest of the insurance companies we've agreed upon what exhibits could be submitted with their declarations. And as to those policies and settlement agreements we would still maintain relevance objections. But for the purposes of this Phase I hearing, and without prejudice to other proceedings and later hearings we would waive authenticity and business record and other objections save relevance to the admission of the settlement agreements and the insurance policies.

MR. BERNICK: Your Honor, it seems to me that whatever Mr. Horkovich and Mrs. Sayen and the carriers are going to work out offline they're going to work out and that we'll learn about it. I think that the only issue is with respect to those exhibits that are going to be tendered yet today because people want to tender them today, I'm assuming

that they're all just policies and settlement agreements so that Mr. Horkovich can comment on them. That all other exhibits beyond policies and settlement agreements are subject to the cull, and that the cull will be done, as I understand from Ms. Harding, by -- we'll get that stuff by the 26th.

UNIDENTIFIED ATTORNEY: This Friday. Yes. The 26th.

MR. BERNICK: Okay. So that all that's going to happen this afternoon then for those who are here and want to make themselves useful and effective and get these matters of record are people who've got policies and settlement agreements who want to do that this afternoon. And Mr. Horkovich can participate by phone along with Mr. Guy and Mrs. Sayen. And I think that we're just going to be making a record pretty much of what's been agreed.

UNIDENTIFIED ATTORNEY: I have letters to you. Exactly.

MR. BERNICK: If you have letters to me that Mr. Horkovich can authenticate that's fine. But I would have thought that letters to me are part of the cull. So if --

UNIDENTIFIED ATTORNEY: I'm planning to introduce them.

MR. BERNICK: What?

UNIDENTIFIED ATTORNEY: I'm planning on introducing them.

MR. BERNICK: Well, that's exactly the kind of --

THE COURT: All right. Let's just get started. Let's take a recess for lunch because this is obviously not going to be the easy submission that everybody thinks it is. So we will take a --

MR. BERNICK: Well, Your Honor, really before we do that for people to hang around at the estate's expense just to deal with somebody who wants to put in a letter, I mean, I really don't think that that makes a lot of sense to take up the Court's time with arguments about miscellaneous documents. If it's policies and agreements, there are a stack of them, and they can be handled. And I would urge that with respect to non-agreements and non-policies that they be carried over to this cull process. And if he wants to tender it we'll take a look at it. But for everybody to sit around here this afternoon while Mr. Cohn kind of waves his document I think is a waste of money and time.

MR. COHN: Your Honor, real quickly.

THE COURT: You need a microphone.

MR. COHN: I'm talking about 15 policies, four letters from my firm to his firm, a settlement agreement, and some interrogatory responses from them. There's no authenticity --

MR. BERNICK: Oh, so now it's an interrogatory this time.

MR. COHN: Well, they're admissions that they've

made. So I'm going to, you know, going to proffer them subject to the relevance objection. It's not an authentication issue. And as long as it's taken me to tell you that I could proffer it.

THE COURT: All right. We're going to do it today. Whatever the insurers -- this is the date that's set for the evidentiary hearing. We're going to take whatever they want to give me today. To the extent that it's -- something is going to go through this cull process and you prefer to get it in in one binder set that may end up being a better way to go about it. If you don't want to do it that way we're here. We'll take a recess until 1:15, and then we'll reconvene and I'll hear the evidence. And that's what I'm hearing this afternoon. We're starting with evidence, not argument. Does anybody have anything you want to say by way of argument before we leave? Thank you. We're in recess.

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C E R T I F I C A T I O N

We, RITA BERGEN, MARY POLITO, and KIMBERLY UPSHUR, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Rita Bergen DATE: June 25, 2009
RITA BERGEN

/s/ Mary Polito
MARY POLITO

/s/ Kimberly Upshur
KIMBERLY UPSHUR
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